92-809

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

RONA M. FIELDS,

Petitioner,

v.

CLARK UNIVERSITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a Title VII plaintiff who sufficiently proves that gender was a motivating factor in an adverse university tenure decision within the meaning of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) must also prove a prima facie case of discrimination as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

II. Whether a statement by one of a panel of six decision-makers explicitly adopted by at least one more member of said panel in a Title VII university tenure case that refusing a sexual advance was "no way to get tenure" at the subject institution constituted evidence sufficient to satisfy the Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) threshold for shifting the burden of proof to the employer.

III. Whether a defendant in a Title VII university tenure case who was motivated at least in part by gender within the meaning of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) must do no more than prove that a rejected applicant's qualifications for tenure were at least questionable to prevail.

PARTIES TO THE PROCEEDINGS

The parties to this petition are the same as the parties to the appeal and civil action below, as reflected in the caption.

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OPINIONS BELOW

The opinion from which review is sought, Fields v. Clark University, 966 F.2d 49 (1st Cir. 1992), is reproduced at pages A1-A26 of the Appendix hereto. The district court opinion (dated March 14, 1986) from which appeal was taken is unpublished and is reproduced at pages A27-A58 of the Appendix hereto.

The first opinion of the United States Court of Appeals for the First Circuit in this matter is reported at 817 F.2d 931 (1st Cir. 1987) and is reproduced at pages A59-A91 of the Appendix hereto. The district court opinion (dated April 16, 1991) from which that appeal was taken is unreported and is reproduced at pages A92-A107 of the Appendix hereto.

A determination by the United States Equal Employment Opportunity

Commission (dated April 5, 1979) in this matter is reproduced at pages A108-A113 of the Appendix hereto.

JURISDICTION

The United States Court of Appeals for the First Circuit Court decided this case and entered judgment on June 11, 1992. On September 11, 1992, upon application, this Court extended the time in which petitioner could file a petition for a writ of certiorari in this Court to November 8, 1992. This Court's jurisdiction arose pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

This action is based on Title VII of the Civil Rights Act of 1964, as

amended, which provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Sec. 2000e-2(a).

STATEMENT OF THE CASE

In 1972, Respondent Clark University ("Clark") hired Petitioner Rona M. Fields ("Dr. Fields") as a full-time associate professor in Clark's sociology department. (App. at A61) Upon completion of her second year of teaching, six members of the sociology department, all male, voted unanimously

to recommend that Dr. Fields be denied tenure. (App. at A61) Dr. Fields requested that the denial be reconsidered by the department but on review the six members of the department affirmed their decision. (App. at A61) The departmental vote was upheld by Clark's committee on personnel, and the decision was forwarded to Clark's board of trustees. (App. at A62) The board of trustees voted to give Dr. Fields a one-year terminal appointment ending August 31, 1976. (App. at A62)

Dr. Fields filed a timely charge with the Equal Employment Opportunity Commission, claiming that the tenure decision constituted discrimination on the basis of gender. (App. at A63) The Equal Employment Opportunity Commission found reasonable cause to believe the

allegations and issued a right to sue letter. (App. at A108-A113) Dr. Fields instituted this action in district court, and trial commenced before District Judge Walter J. Skinner. Jurisdiction was based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq.

At trial, Dr. Fields "testified to a continuous course of sexual harassment, sexual innuendo and denigration of her professional status because of her sex by the male faculty members of the department of sociology." (App. at A100-A101) She further testified that one of the six individuals who subsequently participated in the vote denying her tenure "made sexual advances toward her, and when she rejected them, he warned

that her refusal 'was no way to get tenure.'" (App. at A64) This testimony was credited as true by Judge Skinner. (App. at A101)

Clark justified its tenure decision on Dr. Fields' alleged "lack of competence as a teacher." (App. at A96) The "Faculty Handbook published by the university establishes four criteria for tenure; scholarship (primarily evidenced by publications), effective teaching, significant contribution to the university through committee work and similar services, and seniority." (App. at A96-A97) According to Clark, although Dr. Fields' "scholarship and contributions to the university were adequate, they were deemed . . . not to be so outstanding as to overcome the

deficiencies in her teaching." (App. at A97)

Judge Skinner found that there was "a pervasively sexist attitude on the part of the male members of the sociology department, the same people who made the basic decision to deny tenure to the plaintiff." (App. at A100) Judge Skinner further found that "there was also evidence that male members of the sociology faculty had been awarded tenure with similar teaching evaluations" as that of Dr. Fields. (App. at A100) Judge Skinner did "not find any evidence of improper bias in the subsequent review procedure or on the part of the ultimate deciding authority, the board of trustees." (App. at A102) He concluded, however, that such evidence was not necessary "if

sexual discrimination was a significant factor in the course of events which led to the denial of tenure." (App. at A102)

Although Judge Skinner concluded "that the department of sociology was generally permeated with sexual discrimination of which the plaintiff was in fact a victim," (App. at A101-A102), he did not order that Clark grant Dr. Fields tenure because she had not proven that she would have been granted tenure in the absence of discrimination. (App. at A105-A106) Instead, he ordered Clark to reinstate her for a probationary period of two years and then "renew the tenure decision process under circumstances free from sexual discrimination." (App. at A106)

Both Dr. Fields and the University appealed. Dr. Fields argued "that the

court misallocated the burdens of proof" and that "she was entitled to reinstatement with tenure and full back pay" as Clark had not proven that it would have made the same decision even in the absence of discrimination. (App. at A67, A69) Clark also argued "that the burdens of proof were incorrectly applied" as it was Dr. Fields' burden to show that she would have been granted tenure even in the absence of discrimination. (App. at A67-A69)

The First Circuit stated that Judge Skinner's "finding that sexual discrimination 'impermissibly infected' the decision not to grant Fields tenure" was "the equivalent of a finding that she proved by direct evidence that discrimination was a motivating factor in the decision." (App. at A90) In a

case of first impression before the First Circuit, the court held "that when a plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the burden is on the employer to prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." (App. at A88) Accordingly, it reversed. However, even though Dr. Fields had proved by direct evidence that discrimination was a motivating factor in the tenure decision, the First Circuit remanded "for a new trial on all issues by another district court judge." (App. at A91)

District Judge Robert E. Keeton presided over the second trial. Dr.

Fields, through her former counsel, stipulated in writing to a so-called "mini-trial" where witness affidavits were submitted in lieu of live testimony. (App. at A4) In an abbreviated format, live testimony was presented at trial to rebut and supplement the respective parties' affidavits and exhibits. (App. at A4)

According to Judge Keeton, "perhaps the most powerful testimony offered by plaintiff was her recollection of a comment by Stan Gerber, a colleague in the sociology department and one of the department members who voted not to recommend tenure in her case." (App. at A42) Dr. Fields had testified that "Gerber had told her 'that's no way to get tenure around here' the day after she had rebuffed a pass that he made at

her." (App. at A42) Judge Keeton credited the truth of this testimony for the sake of his decision. (App. at A42) Indeed, Judge Keeton did not even consider the affidavit of Gerber. (App. at A57-A58) Judge Keeton further assumed for the sake of his decision that Gerber's conduct was "direct evidence of an improper motivation on the part of Gerber" in the tenure vote which took place two years after the incident in question. (App. at A42) Dr. Fields further testified at trial that, within several weeks after the incident, she complained to the chairman of the sociology department, Dr. Sampson, about Dr. Gerber's conduct. (App. at A120-A121) According to Dr. Fields' testimony, Dr. Sampson responded to her complaint by stating that Dr. Gerber

"was probably drunk," and, when she protested that Gerber's being drunk did not matter, Dr. Sampson ended the conversation by replying, "which of us would you prefer?" (App. at A121-A122) Dr. Fields, however, never submitted sexually to either Dr. Sampson or Dr. Gerber. Drs. Sampson and Gerber subsequently voted to deny tenure to Dr. Fields.

With respect to the foregoing, Judge Keeton stated:

> Even if I were to credit Gerber's statement as direct evidence of an improper motivation on the part of Gerber in a tenure vote made two years later, I could not find that improper motives on the part of one member of a six member department would constitute direct evidence of an improper motive on the part of the sociology department as a whole in its unanimous vote to deny tenure. Moreover, the recommendation of the sociology department was only the first stage of a tenure review process that included unanimous concurrence by

> the COP, the President, the Board of Trustees and the FRC. . . .
>
> Plaintiff argues that several other pieces of evidence presented in her case constitute "direct" evidence. I do not dwell on them because, viewed most favorably to plaintiff, they fall short of "direct" evidence of gender discrimination by the decision-making entities for the same reasons noted in the next preceding paragraph.

(App. at A42-A44) Accordingly, Judge Keeton ruled that "Dr. Fields had failed to establish that the tenure decision was impermissibly tainted by gender bias in violation of Title VII." (App. at A4-A5)

In finding for Clark, Judge Keeton discussed the standard of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) for so-called

"pretext" cases, as well as the standard set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) for so-called "mixed-motive" cases. However, he "refrained from deciding which of these standards applied to the instant case, finding that Dr. Fields had not satisfactorily established a prima facie case under either standard." (App. at A5-A6) Dr. Fields appealed.

After expounding at length on the standards set forth by this Court for pretext cases in McDonnell Douglas and for mixed-motive cases in Price Waterhouse, the First Circuit framed the issue before it as follows:

> Only if the District Court's analysis of the facts of the case was clearly erroneous and the plaintiff did successfully make out a prima facie case of discrimination would the court have committed error by failing to

> articulate the applicable legal standard.

(App. at A15) The court then proceeded to analyze the case solely on the basis of whether Dr. Fields had made out a prima facie case under the McDonnell Douglas framework tailored by the First Circuit for university tenure cases in Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 62 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981). (App. at A16-A21) The First Circuit's sole inquiry was whether Dr. Fields had proven the second prong of the McDonnell Douglas prima facie case:

> (2) that she was a candidate for tenure and was qualified under Clark University standards, practices or customs.

(App. at A17-A18) The First Circuit held that Judge Keeton's finding that Dr. Fields had not proven the second

element of a McDonnell Douglas prima facie case (qualification) due to alleged teaching deficiencies was not clearly erroneous and affirmed. The circuit court failed to discuss or even address the direct evidence of discrimination presented by Dr. Fields (and credited by the district court for the sake of its decision), i.e., that one of the six decision-makers had told her that a refusal to have sex with him was "no way to get tenure" at Clark. Instead, it set forth as a prerequisite that Dr. Fields prove a prima facie case of discrimination under the McDonnell Douglas framework.

As a caveat to its primary holding, the circuit court alternatively held that, even if Dr. Fields had made out a McDonnell Douglas prima facie case,

there would be no need to determine which framework applied:

> Under both standards, Defendant-Appellee would prevail because it sufficiently demonstrated that Dr. Fields' qualifications for tenure were at least questionable.

(App. at A21) The circuit court failed to provide any authority for this standard.

Dr. Fields submits that the First Circuit erred in assuming that a prima facie case of discrimination under McDonnell Douglas is a prerequisite to liability under Price Waterhouse. Flowing from this error, the court failed to assess Dr. Fields' contention that she had proved by direct evidence that the tenure decision was motivated at least in part by unlawful discrimination. And, Dr. Fields submits that the testimony of Dr. Fields,

credited by the district court for the sake of its decision, was sufficient evidence of discriminatory motivation to shift the burden to Clark, thus rendering a prima facie case under McDonnell Douglas irrelevant. Finally, the circuit court's caveat that, even if Price Waterhouse applied, Clark would prevail because it demonstrated that Dr. Fields' qualifications for tenure were "at least questionable" simply disregards the standard set forth in Price Waterhouse. For these reasons, petitioner respectfully requests that this Honorable Court review and reverse the decision of the First Circuit.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH THIS COURT'S DECISION IN PRICE WATERHOUSE V. HOPKINS, 490 U.S. 228 (1989) WITH RESPECT TO THE APPLICABILITY OF THE FRAMEWORK FOR ANALYZING TITLE VII CASES SET FORTH IN MCDONNELL DOUGLAS CORP. V. GREEN, 411 U.S. 792 (1973) and TEXAS DEP'T OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981)

The McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), framework for analyzing so-called "pretext" cases arising under Title VII cases is familiar. A plaintiff must first prove that she is a member of a protected class, that she was qualified for the position she sought, that she was adversely affected by the employment decision, and that she was rejected

under circumstances which give rise to an inference of unlawful discrimination. McDonnell Douglas, 411 U.S. at 792; Burdine, 450 U.S. at 253. The burden of production then shifts to the employer to articulate a legitimate reason for the adverse decision. McDonnell Douglas, 411 U.S. at 802. To prevail under the McDonnell Douglas framework, the plaintiff must then prove that the employer's stated reason for the decision is a pretext for discrimination. Burdine, 450 U.S. at 253.

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), this Court set forth a different framework for analyzing cases involving employment decisions that result from both legitimate and illegitimate motives, i.e., "mixed-

motive" cases. "In pretext cases, the issue is whether either illegal or legal motives were the 'true' motive behind the decision." Hopkins, 490 U.S. at 260 (White, J., concurring in judgment). A mixed-motive case, on the other hand, "is a result of multiple factors, at least one of which is legitimate." Id. In such a case, once it is shown "that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." Price Waterhouse, 490 U.S. at 244-45 (plurality opinion).

The instant case presents the question whether a plaintiff bears the burden of proving the second prong

(qualification) of a McDonnell Douglas prima facie case even where Price Waterhouse would otherwise be applicable and even where lack of qualification is the employer's articulated justification for its decision. The First Circuit held that the plaintiff does bear this burden of proof even under the Price Waterhouse framework.[1] This requirement conflicts with the rationale underlying Price Waterhouse as well as pre- and

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[1] The First Circuit held that, "[i]f it is true that plaintiff-appellant did not make out her prima facie case of sex discrimination, then a court cannot require defendant-appellee to do anything to defend its actions. The District Court appropriately refrained from applying the second tier of either McDonnell Douglas or Price Waterhouse analysis to the instant case." (App. at A14-A15) The court then proceeded to analyze Judge Keeton's finding that plaintiff had not proven her prima facie case by a preponderance of evidence under the McDonnell Douglas framework alone. (App. at A16-A21)

post-Price Waterhouse opinions from other circuits.

Consider, for instance, a straight forward mixed-motive case in which an employer states that an Afro-American has been denied a promotion because she is "black and unqualified to boot." Certainly, the burden of proof is not on the Afro-American to prove that she was qualified under Price Waterhouse. If the First Circuit is right, however, the employer could not be required "to do anything to defend its actions." (App. at A15) Qualification is an element of the McDonnell Douglas prima facie case. The employer in the foregoing example thus would never bear the burden of proving that it would have made the same decision absent racial considerations. The burden would remain with the

plaintiff at all times. Nothing in the Price Waterhouse plurality or concurring opinions hints at such a result.

The overwhelming weight of authority both pre- and post-Price Waterhouse holds that the McDonnell Douglas prima facie case is inapplicable where, as here, direct evidence of discriminatory motivation is presented and assumed to be true. In Perry v. Kunz, 878 F.2d 1056 (8th Cir. 1989), a post-Price Waterhouse case, the Eighth Circuit squarely faced the issue upon which the First Circuit based its decision. The plaintiff there was absolutely precluded from establishing the qualification prong of a McDonnell Douglas prima facie case due to an earlier finding by an administrative agency that "she failed to meet the

minimum standards of her job." Id. at 1058. In reversing a summary judgment for the employer, the court stated:

> plaintiff is not required to prove a prima facie case utilizing only the so-called McDonnell Douglas method of proof, but may utilize either that indirect method of proof or may attempt to prove that age was a determining factor in defendant's decision to terminate her utilizing direct evidence. Since that is true, plaintiff in this case was not necessarily precluded from making a prima facie case simply because she could not prove one of the elements of the McDonnell Douglas test.

Id. at 1058. Similarly, in EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990), a post-Price Waterhouse case, the Eleventh Circuit held that proof of a prima facie case under McDonnell Douglas is required "where circumstantial evidence is the only proof of discrimination. When a plaintiff proves a case of

discrimination by direct evidence, application of McDonnell Douglas is inappropriate." Id. at 923.

Not only is the First Circuit in irreconcilable conflict with post-Price Waterhouse opinions of the Eighth and Eleventh Circuits, it is in conflict with the overwhelming weight of pre-Price Waterhouse authority. See Perry v. Kunz, 878 F.2d at 1059 (collecting authority). Indeed, this Court touched upon the issue in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), and rejected the requirement imposed by the First Circuit. In response to a finding that the employer's transfer policy was discriminatory on its face, the employer argued that the employees had nonetheless failed to establish a prima facie case under McDonnell

Douglas. This Court held that "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Id. at 121.

The fallacy of the First Circuit's approach is all the more telling in the context of Title VII university tenure cases and the inherent problems of proof posed by the academic setting. It is one thing to prove that an individual is, for instance, a qualified mechanic -- the prima facie burden faced by the plaintiff in McDonnell Douglas -- welder, assembly line worker, or laborer. The myriad and often subjective factors which are taken into account in university tenure decisions,[2]

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[2] For a detailed description of the complicated and legitimate considerations that underlie a university's decision to grant or deny

(continued...)

on the other hand, frequently create insurmountable barriers to plaintiffs at the prima facie case stage of cases such as the present one. See 2 Larson, Employment Discrimination, Sec. 50.71(a) at pp 10-72 to 10-80 (1992). In the academic setting, a plaintiff's case thus frequently turns on whether she was "qualified" for the position at issue within subjective standards set by the institution. Id.

"Qualification" thus becomes the ultimate inquiry in Title VII university tenure cases. It is the focus of the aspiring academician's prima facie case as well as the institution's defense. This is all the more reason to give the

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[2](...continued)
tenure, see Zahorik v. Cornell University, 729 F.2d 85, 92-93 (2nd Cir. 1984).

Price Waterhouse framework full force and effect in the academic setting. Once a female academician proves discrimination, the burden should not be on her to shoulder the difficult burden of proving qualification as well. The institution which is proved to have discriminated should bear the burden of proving lack of qualification. "It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof[.]" Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556 (11th Cir. 1983). This could not be more true than in the traditionally male bastion of the institution of higher education.

The McDonnell Douglas framework is merely an evidentiary scheme designed to

aid plaintiffs where no direct evidence of discrimination is presented, not to hinder plaintiffs when direct evidence of discrimination is presented. "As should be apparent, the entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." Price Waterhouse, 490 U.S. at 271 (O'Conner, J., concurring). It would be an anomalous result indeed to deprive a Title VII plaintiff of the use of direct proof of discrimination pursuant to an evidentiary scheme designed to aid Title VII plaintiffs with no direct proof of discrimination. Dr. Fields respectfully requests this Court to review the First Circuit's opinion and settle the conflict created by that opinion.

II. THIS COURT'S REVIEW IS NECESSARY TO END CONFUSION AMONG THE LOWER COURTS AS TO THE DEFINITION OF EVIDENCE IN DISCRIMINATION CASES SUFFICIENT TO ACTIVATE THE FRAMEWORK FOR MIXED-MOTIVE CASES SET FORTH BY THIS COURT IN PRICE WATERHOUSE V. HOPKINS, 490 U.S. 228 (1989)

The First Circuit erred as a matter of law in assuming that Dr. Fields had the burden of proving a McDonnell Douglas prima facie case irrespective of whether the Price Waterhouse framework applied. Accordingly, the First Circuit failed to consider whether the Price Waterhouse framework applied at all. Dr. Fields respectfully submits that Price Waterhouse does apply to the facts of this case as she produced sufficient evidence to prove that gender was a motivating factor in Clark's tenure decision.

This Court has by no means decided

that so-called "direct evidence" of discrimination is a prerequisite for activating the framework set forth in Price Waterhouse. Only four Justices in Price Waterhouse indicated that they would require "direct evidence" of discrimination to establish a mixed-motive case, and thus to shift the burden of proof to the employer. Compare Price Waterhouse, 490 U.S. at 251-52 (plurality opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.) (not adopting requirement of direct evidence) and id. at 258 (White, J., concurring) (not addressing issue) with Price Waterhouse, 490 U.S. at 276 (O'Conner, J., concurring) (adopting requirement of direct evidence) and id. at 280 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.)

(characterizing judgment of Court as requiring direct evidence). Indeed, given the fragmentation of the Court, an apparent conflict has arisen between the circuits on whether "direct evidence" is required to activate the Price Waterhouse framework. Compare Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1187 (2nd Cir. 1992) ("direct evidence" not required), cert. denied, 60 U.S.L.W. 3860 (1992) with Bruno v. City of Crown Point, Ind., 950 F.2d 355, 361 (7th Cir. 1991) ("direct evidence" required) and Ramsey v. City and County of Denver, 907 F.2d 1004, 1009 (10th Cir. 1990) ("direct evidence" required).

Putting aside this conflict, once a plaintiff does prove by direct evidence that the employer was motivated in part by discriminatory considerations, the

employer must prove that it would have made the same decision absent discrimination. The foregoing, however, only begs the question. "What is "direct evidence" sufficient to satisfy the Price Waterhouse threshold?" Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991). "The various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases." Tyler, 958 F.2d at 1183. An opportunity is thus presented for this Court to consider further the question of "direct evidence" in the context of employment discrimination cases and to provide

needed guidance to the lower federal courts on this issue.[3]

The question of "direct evidence" is directly presented here. Dr. Fields produced unrebutted evidence of a quid pro quo statement ("no sex; no tenure at Clark") by one of the six actual decisionmakers -- Dr. Gerber. And, for the sake of its decision, the district court assumed that the foregoing constituted "direct evidence of an improper motivation on the part of [Dr. Gerber]" in casting his vote to deny Dr.

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[3] The need for guidance is all the more pressing as future Title VII cases will be presented to a jury by virtue of the Civil Rights Act of 1991 which amended Title VII to provide for trial by jury. See Price Waterhouse, 490 U.S. at 291-92 (Kennedy, J., dissenting) (noting the "unenviable" task of the trial judge in formulating instructions in age discrimination cases where mixed motivation is a jury issue).

Fields tenure. Further, Dr. Fields testified that when she complained to the chairman of the department, Dr. Sampson, about Dr. Gerber's threat that her refusal to have sex was "no way to get tenure" at Clark, Dr. Sampson replied, "which of us would you prefer?" This evidence too may be credited as true for the sake of the district court's decision.[4] Due to its error in engrafting a McDonnell Douglas prima

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[4] Judge Keeton made no express finding of fact with respect to whether Dr. Field's testimony regarding the foregoing exchange between Dr. Sampson and her was accurate. He did, however, note that Dr. Fields claimed that "several pieces of evidence [other than the Gerber incident] presented in her case constitute 'direct' evidence" but found that, "viewed most favorably to plaintiff, they fall short of 'direct' evidence of gender discrimination by the decisionmaking entities." Accordingly, the testimony may be assumed accurate for the purposes of appellate review.

facie case requirement onto the Price Waterhouse framework, however, the First Circuit failed even to consider whether evidence sufficient to shift the burden to Clark was presented in the district court. Dr. Fields submits that sufficient evidence was indeed presented.

"Price Waterhouse does not define direct evidence." EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990). Justice O'Connor's concurring opinion in Price Waterhouse, however, provides a starting point for inquiry. Therein, she states the standard in the negative. According to Justice O'Connor, "stray remarks in the workplace," "statements by non-decisionmakers," or "statements by decisionmakers unrelated to the

decisional process itself" do not constitute direct evidence sufficient to shift the burden of proof. Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring). The evidence in the instant case, however, cannot be pigeon-holed into any of these three categories. The quid pro quo statement was made by an actual decisionmaker, and the quid pro quo statement was directly related to the process of granting or denying tenure at Clark. According to one of the six decisionmakers, a refusal to submit to sexual advances is "no way to get tenure" at Clark. And, in response to Dr. Fields' complaint about the foregoing statement, another of the decisionmakers stated, "which of us do you prefer?" These can hardly be considered "stray remark[s] in the

workplace." See Burns v. Gadsden State Community College, 908 F.2d 1512, 1518-19 n.9 (11th Cir. 1990) (remark "directly related" to hiring decisions involving the kind of position for which the plaintiff applied" is not a "stray remark"); EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990) (general manager's remark that "if it was his company, he wouldn't hire any black people" sufficient to shift burden in discriminatory denial of promotion case). Compare Young v. City of Houston Texas, 906 F.2d 177, 181 (5th Cir. 1990) (two racial slurs merely "stray comments" and not enough to shift the burden); Gagne v. Northwestern National Insurance Co., 881 F.2d 309, 314 (6th Cir. 1989) (solitary remark by supervisor that he "needed younger

blood" not sufficient to shift burden in age discrimination case). Justice O'Connor's guidance in Price Waterhouse thus, while not dispositive, would indicate that the evidence here is sufficient to shift the burden.

Some circuits in the wake of Price Waterhouse have attempted to define direct evidence sufficient to shift the burden in terms of general principles. For example, the First Circuit has defined "direct evidence" as "evidence which, in and of itself, shows a discriminatory animus." Jackson v. Harvard University, 900 F.2d 464, 467 (1st Cir. 1990), cert. denied, 112 L.Ed.2d 104 (1990). The Second Circuit has equated direct evidence with evidence which "shows that the impermissible criterion played some part

in the decision-making process." Barbano v. Madison County, 922 F.2d 139, 145 (2nd Cir. 1990). And, the Eleventh Circuit has defined "direct evidence" as evidence which "relates to actions or statements of an employer reflecting a discriminatory . . . attitude correlating to the discrimination . . . complained of by the employee." Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990). The evidence here fulfills each of the foregoing formulations.

Tying a refusal to have sex to a denial of tenure, "in and of itself, shows a discriminatory animus" against female academicians. Price Waterhouse thus appears applicable under the First Circuit test. Further, Judge Keeton assumed for the sake of his decision

that the conduct at issue was "direct evidence of an improper motivation on the part of [one of the six decisionmakers]" in the tenure vote. Price Waterhouse thus appears applicable under the Second Circuit test. Finally, a refusal to have sex was directly "correlated" to receiving tenure at Clark. Price Waterhouse thus appears applicable under the Eleventh Circuit test.

Judge Keeton stated that he "could not find that improper motives on the part of one member of a six member department would constitute direct evidence of an improper motive on the part of the sociology department as a whole in its unanimous vote to deny tenure." (App. at A42-A43) This, however, misstates the evidence. The

evidence was not limited to the motivation of one individual. Two of the six decisionmakers (one of which was the chairman of the department) were involved in the quid pro quo threat. Indeed, when Dr. Fields complained about Dr. Gerber to the chairman of the department, Dr. Sampson, he did nothing to disavow Dr. Gerber's threat. Instead, he indicated that Dr. Fields could submit to him rather than Dr. Gerber.[5] Not only did the evidence

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[5] Even accepting Judge Keeton's assumption that improper motivation could be confined to one of the six voters, the rationale underlying Price Waterhouse supports shifting the burden to Clark to show that it would have made the same decision absent the discriminatory animus of one voter out of the six. See Barbano v. Madison County, 922 F.2d 139, 145 (2nd Cir. 1990) (statements indicating gender discrimination by one member of nineteen member decisionmaking board sufficient to shift burden).

presented directly show improper motivation on the part of two of the six decisionmakers in the tenure decision, it constitutes strong circumstantial evidence of base sexism in the sociology department as a whole. See Tyler, 958 F.2d at 1187 ("direct evidence" not required to shift burden).[6]

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[6] It is not unreasonable to assume that the behavior and attitude of a department chair reflects the attitude and behavior of the department as a whole. Indeed, at the first trial of this matter, Judge Skinner found that there was "a pervasively sexist attitude on the part of the male members of the sociology department, the same people who made the basic decision to deny tenure to the plaintiff." (App. at A100) While the findings rendered in the first trial are perhaps of no legal relevance here, they do lend common sense credence to Dr. Field's claim that this is not a case where, "despite the smoke, there is no fire." Price Waterhouse, 490 U.S. at 266 (O'Connor, J., concurring). One fact-finder did indeed investigate the smoke and consequently discovered the fire.

As the plurality stated in Price Waterhouse, this Court's "assumption always has been that if an employer allows gender to affect its decision making process, then it must carry the burden of justifying its ultimate decision." Price Waterhouse, 490 U.S. at 248 (plurality opinion). As Justice O'Connor noted in Price Waterhouse:

> Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.

Price Waterhouse, 490 U.S. at 273 (O'Connor, J., concurring) (citing as an example Dr. Fields' case, Fields v. Clark University, 817 F.2d 931, 935-37 (1st Cir. 1987)). Dr. Fields presented

direct evidence that her gender played a motivating part in the tenure decision. It is Clark, not Dr. Fields, who must "bear the risk that the influence of legal and illegal motives cannot be separated." Price Waterhouse, 490 U.S. at 250 (plurality opinion) (quoting NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983)).

Due to its error in engrafting a McDonnell Douglas prima facie case requirement onto the Price Waterhouse framework, the circuit court failed even to discuss the direct evidence presented by Dr. Fields. That evidence "relates to actions or statements of [Clark] reflecting a discriminatory . . . attitude correlating to the [tenure decision]," Caban-Wheeler, 904 F.2d at 1555, "shows that [gender] played some

part in the decision-making process," Barbano, 922 F.2d at 145, and, "in and of itself, shows a discriminatory animus." Jackson, 900 F.2d at 467. In sum, the evidence directly shows that base sexism plays a part in tenure decisions within the sociology department at Clark in general and did, in fact, play a part in the tenure decision at issue here. Price Waterhouse applies to this case.

It was error for the First Circuit to fail to consider Dr. Fields' direct evidence of discrimination in the tenure process at Clark. That evidence was sufficient to shift the burden to Clark. Dr. Fields respectfully requests this Court to review the First Circuit's opinion and provide needed guidance to the lower courts with respect to the

quality of evidence sufficient to shift the burden of proof under Price Waterhouse.

III. THE FIRST CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN PRICE WATERHOUSE V. HOPKINS, 490 U.S. 228 (1989) IN SO FAR AS IT WOULD IMPOSE A LESSER BURDEN THAN THAT ENUNCIATED BY THIS COURT ON A DEFENDANT WHICH WAS MOTIVATED IN PART BY DISCRIMINATION IN A TITLE VII UNIVERSITY TENURE CASE

The First Circuit held that, even if Price Waterhouse applied, Clark had carried its burden of proof because "it sufficiently demonstrated that Dr. Fields' qualifications for tenure were at least questionable." (App. at A21) Once the Price Waterhouse framework is activated, however, a defendant may prevail only "by proving that it would have made the same decision even if it had not allowed gender to play a role,"

Price Waterhouse, 490 U.S. at 244-45 (plurality opinion), or, in other words, "'that it would have reached the same decision . . . in the absence of' the unlawful motive," id. at 260 (White, J., concurring). It simply is not enough for a defendant to show that a plaintiff's qualifications for a position are "at least questionable" under Price Waterhouse.

The First Circuit failed to provide any authority for its "at least questionable" standard. Perhaps this standard has its genesis in the First Circuit's traditional reluctance to intrude into the realm of academic affairs. See, e.g., Jackson v. Harvard University, 900 F.2d 464, 467 (1st Cir. 1990) ("courts must be mindful of the essentially subjective nature of tenure

decisions and, therefore, 'must take special care to preserve the University's autonomy in making lawful tenure decisions.' Brown v. Trustees of Boston University, 891 F.2d 337, 346 (1st Cir. 1989)."). Where, as here, however, a female academician has proved by direct evidence that her gender played a motivating role in a tenure decision, the defendant is entitled to no such deference.

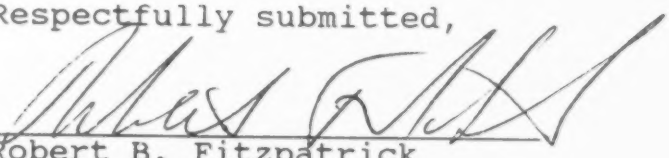
Just as McDonnell Douglas applies in the academic setting, so too Price Waterhouse applies in the appropriate case. A university cannot shield itself behind subjectivity and academic freedom once its has been shown to have discriminated. Here, the discrimination is of the lowest kind -- sex for tenure. The First Circuit erred in disregarding

the standard it set forth in its first opinion in this case. Clark must prove that "the same decision would have been made absent the discrimination." Fields v. Clark University, 817 F.2d 931, 936 (1st Cir. 1987). Indeed, given the highly subjective nature of university tenure decisions, the standard set forth by the First Circuit is "tantamount to declaring Title VII inapplicable" to such decisions. Price Waterhouse, 490 U.S. at 273 (O'Connor, J., concurring) (citing Fields, 817 F.2d at 935-37). Dr. Fields respectfully requests this Court to review the First Circuit's opinion as it disregards the standard set forth in Price Waterhouse.

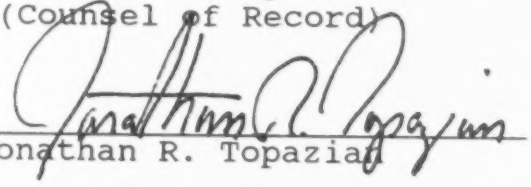
CONCLUSION

WHEREFORE, for the reasons set forth herein, petitioner respectfully requests this Honorable Court to grant her petition for a writ of certiorari.

Respectfully submitted,



Robert B. Fitzpatrick
(Counsel of Record)



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UNITED STATES COURT OF APPEALS
For the First Circuit

No. 91-2331 RONA M. FIELDS,

Plaintiff, Appellant,

v.

CLARK UNIVERSITY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, U.S. District Judge]

Before
Selya, Circuit Judge,
Campbell, Senior Circuit Judge
and Pettine,* Senior District Judge.

Frederick T. Golder with whom Bernstein, Golder & Miller, P.A. was on brief for appellant.
William L. Patton with whom David J. Kerman and Ropes & Gray were on brief for appellee.

June 11, 1992

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*Of the District of Rhode Island, sitting by designation

PETTINE, Senior District Judge.

I.

This appeal centers on a sex discrimination claim arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"). Plaintiff-Appellant Dr. Rona Fields, a former associate professor of sociology at Clark University, instituted this lawsuit in May 1980, claiming she was denied tenure at Clark because of her gender. The case was tried before Judge Skinner, Massachusetts Federal District Court, in September 1985. Judge Skinner concluded that Dr. Fields had not proven entitlement to tenure; nonetheless, he held that Title VII relief was appropriate in light of the sexually

discriminatory atmosphere of Clark University's sociology department. Accordingly, Judge Skinner held Clark University liable to Dr. Fields for back pay and attorneys' fees, and ordered the University to reappoint Dr. Fields for a two-year probationary period before reconsidering her tenure application.

The case was subsequently appealed to the First Circuit Court of Appeals. In Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987), this Court held:

> The district court's finding that sexual discrimination "impermissibly infected" the decision not to grant Fields tenure appears to us to be the equivalent of a finding that she proved by direct evidence that discrimination was a motivating factor in the decision. This finding cannot be reconciled with the court's putting the burden on Fields to prove that she was entitled to tenure. Therefore, the

> court erred in its allocation of this burden of proof. The court also erred by reinstating Fields for two years and awarding back pay without finding that the university, after having been afforded the opportunity to prove Fields would not have been granted-tenure absent discrimination, failed to carry its burden of proof. We, therefore, remand the case for a new trial on all issues by another district court judge.

The case was then heard in an abbreviated format[1] by District Judge Keeton. On April 16, 1991, Judge Keeton entered judgment for Clark University, ruling that Dr. Fields had failed to establish that the tenure decision was

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[1]The parties agreed by written stipulation to proceed by mini-trial, using time-saving procedures such as witness affidavits in lieu of live testimony; the result was a four-day "Tailored Non-Jury Trial."

impermissibly tainted by gender bias in violation of Title VII. Rona Fields v. Clark University, No. 80-1011-K (D. Mass. Apr. 16, 1991.).

II.

A. THE TITLE VII LEGAL STANDARD

The court below discussed the burdens of production and persuasion in Title VII cases as set forth both in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (rearticulated in Texas Dep't. of Commercial Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The District Court judge refrained from deciding which of these standards applied to the

instant case, finding that Dr.Fields had not satisfactorily established a prima facie case under either standard.

On appeal, Plaintiff-Appellant argued that, by not choosing one standard (McDonnell Douglas/Burdine) or another (Price Waterhouse), the District Court, in effect, erroneously relied on the McDonnell standard. This argument necessitates further analysis of the McDonnell Douglas/Burdine and Price Waterhouse Title VII frameworks.

1. THE MCDONNELL DOUGLAS/BURDINE STANDARD

In order for a plaintiff to prevail in a Title VII action, the court must first find that plaintiff has proved a prima facie case by a preponderance of the evidence. Burdine, 450 U.S. at 253.

A McDonnell Douglas/Burdine prima facie showing is "proof of actions taken by the employer from which discriminatory animus can be inferred because experience has proved that in the absence of any other explanation it is more likely than not those actions were based on impermissible considerations." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 568, 98 S.Ct 2943, 2945, 57 L.Ed.2d 957 (1978). "The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an

inference of unlawful discrimination." Burdine, 450 U.S. at 253.

If the court concludes that the plaintiff has proved a prima facie case by a preponderance of the evidence, the court must then consider the defendant's justification for the presumptively discriminatory action or practice. The defendant must meet a burden of production by articulating a legitimate, nondiscriminatory reason for its challenged actions; however, it need not prove that it was actually motivated by the proffered reason. Id. at 254-55.

The plaintiff then must have an opportunity to prove by a preponderance of the evidence that the defendant's proffered reason was merely a pretext for discrimination. If she successfully

demonstrates that such a pretext exists, she has proven defendant's commission of a Title VII violation; if she fails to do so, the presumption of discrimination drops from the case. See, e.g., United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). Plaintiff's burden of persuasion, retained throughout, would then "merge[] with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

Burdine, 450 U.S. at 256, citing McDonnell Douglas, 411 U.S. at 804-05.

2. THE PRICE WATERHOUSE STANDARD

In Price Waterhouse, 490 U.S. at 241-42, the Supreme Court held that "[w]hen...an employer considers both gender and legitimate factors at the time of making a decision...[the employee is not obligated] to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision." The Court continued:

> In saying that gender played a motivating part in an employment decision, we mean that, if we ask the employer

> at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id. at 250.

Once the plaintiff has proven that her gender partly motivated the employer's adverse employment action or decision, the employer will be liable under Title VII unless "it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding [her]." Id. at 242. The Court noted that, because it does not employ burden-shifting, this framework differs from Burdine. Under Price Waterhouse, "the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to

prevail, must persuade it on another." Price Waterhouse, 490 U.S. at 246.

Price Waterhouse therefore does not supplant Burdine. Burdine's burden-shifting approach applies to cases where "either a legitimate or an illegitimate set of considerations led to the challenged decision." Id. at 247 (emphasis in original). Price Waterhouse applies only "[w]here a decision was the product of a mixture of legitimate and illegitimate motives" (commonly referred to as "mixed motive" cases). Id. at 247.

3. THE APPROPRIATE STANDARD FOR THIS CASE

Plaintiff-appellant urges this Court to hold that the appropriate legal framework for this case is found in

Price Waterhouse, presumably because this framework places greater demands on the employer than does the McDonnell Douglas/Burdine framework. Indeed, as Judge Keeton stated:

> [T]he defendant must satisfy a greater burden once plaintiff has proved...that her gender played a motivating part in an employment decision....[This] in effect transforms the defendant's burden, once plaintiff proves a discriminatory motive, from a burden of production to a burden of persuasion.

Fields, No. 80-1011-K, slip op. at 5.

The District Court found that under either McDonnell Douglas/Burdine or Price Waterhouse, plaintiff did not clear her first legal hurdle.

> Plaintiff has failed to offer sufficient evidence...that gender was a motivating factor in any of the unanimous decisions against her at

> each level of the decisionmaking process. -

Fields, No. 80-1011-K, slip op. at 8 (emphasis in original). Thus, there was no need to determine which standard would dictate defendant's subsequent burden, since the next stage of the battle would not be reached [2]

As a matter of law, the District Court did not err in failing to apply the Price Waterhouse standard. If it is

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[2]The District Judge further found that "even if I were to determine that plaintiff had introduced sufficient evidence to show a prima facie case under McDonnell Douglas, or under Hopkins to make this a mixed motive case rather than a pretext case, I would not ultimately decide for the plaintiff because defendant has introduced sufficient evidence of a legitimate, non-discriminatory reason for its decision to deny plaintiff tenure to satisfy its burden of persuasion even under the Hopkins analysis." Fields, No. 80-1011-K, slip op. at 8-9.

true that plaintiff-appellant did not make out her prima facie case of sex discrimination, then a court cannot require defendant-appellee to do anything to defend its actions. The District Court appropriately refrained from applying the second tier of either McDonnell Douglas or Price Waterhouse analysis to the instant case. Only if the District Court's analysis of the facts of the case was clearly erroneous and the plaintiff did successfully make out a prima facie case of discrimination would the court have committed error by failing to articulate the applicable legal standard. Accordingly, we proceed to evaluate whether the district court's determination that Dr. Fields failed to

make out a prima facie case was clearly erroneous.

B. SUCCESS OR FAILURE OF PLAINTIFF-APPELLANT'S PRIMA FACIE CASE

In order to make out a prima facie case, the plaintiff must show:

(1) that she is a member of a protected class under Title VII;

(2) that she was a candidate for tenure and was qualified under Clark University standards, practices or customs;

(3) that despite her qualifications she was rejected; and

(4) that tenure positions in the Department of Sociology at Clark University were open at the time plaintiff was denied tenure, in the sense that others were granted

> tenure in the department during a period relatively near to the time plaintiff was denied tenure.

See, e.g., Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 62 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981).

The only contested element of plaintiff's prima facie case is the second element--her qualifications. To pass this portion of the prima facie test, plaintiff

> need only show that [s]he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [s]he need not show only that h[er] qualifications were at least sufficient to place h[er] in the middle group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of

> discretion by the tenure-decision making body.

Banerjee, 658 F.2d at 63, quoting Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1155-56 (D. Mass. 1980).

In concluding that Dr. Fields had not fulfilled the requirements of the second element of her prima facie showing, the court below stated:

> Having weighed the evidence presented by plaintiff in this case, I find that she has not shown by a preponderance of the evidence that she was sufficiently qualified to place her in the middle group of tenure candidates in the sociology department at Clark University....plaintiff was denied tenure by unanimous vote at each stage in the tenure review process, and failed to receive support from other men and women on the Clark faculty. Plaintiff's own testimony established that she had difficulties teaching some of the large courses to

> which she was assigned, and much of plaintiff's testimony was in the form of argument as opposed to recitation of fact. Defendant has introduced student evaluations and testimony from the plaintiff and the defense witnesses showing that her teaching was criticized by several of her students and that the chair of her department told her on numerous occasions that he was receiving complaints from her students.

Fields, No. 80-1011-K, slip op. at 9-10.

In reviewing a university's tenure decision, neither the trial court nor the appellate court may "simply speculate that [the] plaintiff may have been denied tenure for reasons of [gender]....Inevitably, some tenure decisions...will be very close....Courts have no license to resolve such disputes except where there is evidence from which to conclude that an illicit motive

was at work." Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1, 12 (1st Cir. 1985) (Campbell, C.J., concurring). "[T]enure decisions are by their nature judgmental and subjective. In close cases reasonable people can differ. It is the choice of the university, however, not of the court, that is called for in a faculty member's contract." Id. at 15. Moreover, "[i]n the very complex and nuanced environment of university tenure decisions, a discrimination case with no 'smoking gun' evidence can be excruciatingly close for the district court." Id. at 21 (Coffin, J., dissenting).

We quote extensively from Kumar to emphasize the high degree of deference due to both the University's tenure

decision and the District Court's Opinion. While we might be suspicious of Defendant-Appellee's motives, thorough review of the record provides no opportunity for this Court to find that the District Court's decision was clearly erroneous.[3]

III.

We have reviewed this case with special care because, as noted above, the parties agreed by stipulation to

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[3]Even if this Court found that Plaintiff-Appellant had made out a prima facie case, we would not need to determine whether Defendant-Appellee's actions should be evaluated in accordance with the McDonnell Douglas/Burdine test or, rather, under the Price Waterhouse framework. Under both standards, Defendant-Appellee would prevail because it sufficiently demonstrated that Dr. Fields' qualifications for tenure were at least questionable.

proceed by "mini-trial." There can be little doubt that Title VII plaintiffs face serious obstacles in carrying their onerous evidentiary burdens and, arguably, abbreviated trials may not be the most appropriate procedural format for suits of this kind. Having combed the record in this case, however, we find nothing to demonstrate that the tailored trial compromised Dr. Fields' case. Instead, it appears the trial judge willingly entertained live testimony when the litigants wished to supplement their affidavits. For example, when the defendant wished to present live testimony of several witnesses, the following colloquy took place:

THE COURT: Tell me this: Do you want to bring them before me to

offer testimony beyond what's in their affidavit, or do you just want me to see them?

DEFENSE COUNSEL: No, essentially we want to bring them before you to testify what's [sic] in their affidavit. To the extent their credibility is an issue in the case, we want you to see them.

PLAINTIFF'S COUNSEL: I have no objection.

THE COURT: Well, all right. I'll allow it. I may place some limitation on how much repetition I hear, but I'll allow it.

Fields, No. 80-1011-K, Trial Transcript at 36.

Similarly, when plaintiff's counsel requested the Court's leave to present live testimony by plaintiff, the judge queried, "Why is it you want to call the plaintiff live, for the same reason the defendants have been mentioning, you

want me to see and hear the plaintiff, or is there something more that's not in the affidavit?" Plaintiff's counsel responded, "It's not just the credibility of the witness....the live testimony of Dr. Fields is going to consist to some extent in rebutting some of [defendant's exhibits]." Id. at 38. The judge permitted Dr. Fields to testify.

In short, the District Judge's orchestration of this particular case was extremely flexible. There is nothing in the trial record to indicate Dr. Fields could not have introduced additional live testimony, either to highlight witness credibility or to augment her substantive case. Moreover, Dr. Fields stipulated to the use of a

mini-trial process. Given all of this, we cannot speculate that the trial procedure was unfair or incomplete.

IV.

"The fact that a court might be sympathetic to a tenure award is not enough from which to find discrimination unless the University's stated reasons are palpably unworthy of credence or there is other evidence pointing to discrimination." Kumar, 774 F.2d at 12 (Campbell, C.J., concurring). This Court is neither unaware of nor unsympathetic to the difficulties faced by female academicians who aspire to tenured faculty positions; nonetheless, Dr. Fields has provided us with no basis to reverse the lower court's holding.

Accordingly, the judgment of the District Court must be Affirmed.

UNITED STATES COURT OF APPEALS
DISTRICT OF MASSACHUSETTS

RONA M. FIELDS, Plaintiff v. CLARK UNIVERSITY, Defendant	CIVIL ACTION NO. 80-1011-K

Memorandum of Findings of Fact and
Conclusions of Law
April 16, 1991

Plaintiff brought this action in 1980 alleging that she was denied tenure by defendant Clark University ("Clark" or the "University") because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"). After the case was tried, appealed, and remanded by the First Circuit for a "new trial on

all issues" (Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987)), a new trial commenced on November 2, 1990. Trial resumed on December 20, 1990, and plaintiff completed her case-in-chief on December 21, 1990. After the court denied defendant's motion to dismiss under Fed. R. Civ. P. 41(b), it received defendant's evidence on January 25, 1991.

Plaintiff's case consisted of her own testimony and several exhibits concerning the terms and conditions of her employment as an associate professor of sociology at Clark University from 1972 until 1975, when she was denied tenure. Plaintiff also submitted exhibits relating to the terms and conditions of employment of male

colleagues on the Clark sociology faculty, including documents pertinent to their respective tenure reviews.

During plaintiff's case, defendant offered into evidence several exhibits regarding plaintiff's employment at Clark as well as documents relating to the employment of plaintiff's colleagues in the Clark sociology department. After plaintiff rested, defendant called three witnesses on its behalf: Edward Sampson, chair of the sociology department at Clark during the period in question; Frank Puffer, a dean of the college and member of the Committee on Personnel ("COP") that reviewed the departmental recommendation not to offer plaintiff tenure; and William Koelsch, a member of the Faculty Review Committee

("FRC") that reviewed the University's decision to deny plaintiff tenure.

Defendant contends that plaintiff has not introduced sufficient evidence to establish even a prima facie case of gender discrimination, and further argues, in the alternative, that defendant has produced evidence of plaintiff's poor teaching ability, a legitimate, non-discriminatory reason for its tenure decision. Finally, defendant contends that Fields has failed to demonstrate that defendant's assertion of deficient teaching ability was a pretext for sex discrimination in her case.

Plaintiff, on the other hand, contends that she has introduced both direct and circumstantial evidence that

would support a finding that gender discrimination was a motivating factor in Clark's decision to deny her tenure. She argues, inter alia, that a comparison of her employment conditions and qualifications, including her tenure review process, with those of similarly-situated male members of the Clark sociology department demonstrates that she was discriminated against because of her sex.

I.

The evidence received at trial does not support a finding of gender discrimination in this case. Plaintiff has not met her burden of persuasion under Title VII on the issue of discrimination, and has not satisfied the court that she is entitled to relief

from defendant. Each body that reviewed the merits of plaintiff's tenure case came to the unanimous conclusion that she be denied tenure. The members of her own department voted unanimously to recommend that plaintiff be denied tenure on the basis of her poor teaching ability. After reviewing this decision, and after soliciting more student evaluations at plaintiff's request, a unanimous COP concurred in the recommendation of the sociology department. After the Clark President made the same recommendation to the Board of Trustees, the FRC was convened to ensure that proper procedures had been followed and that gender bias had not affected the various decisionmakers. After talking to yet more students and

reviewing the materials collected in the course of the earlier tenure evaluations, the FRC was unable to substantiate plaintiff's claims of gender bias.

According to the testimony of Professor Koelsch, when the FRC contacted one of the two students whom plaintiff had requested be used as a reference for her teaching ability, the student said that she had felt "pressured" to write a favorable teaching evaluation for plaintiff and that she thought that the University had made the correct decision in denying plaintiff tenure.

Faced with strong evidence that the tenure decision in her case was based on legitimate criteria, plaintiff was

unable to demonstrate by a preponderance of the evidence that her poor teaching ability was used by Clark decisionmakers as a pretext for discrimination. Even if I assume, for the sake of argument, that defendant is required to show by a preponderance of the evidence that its decision was based on legitimate criteria, I find that defendant has made such a showing.

II. BURDENS UNDER TITLE VII

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court unanimously established a framework for analyzing burdens of persuasion and production in Title VII cases. Under this framework, a plaintiff must first

establish a "prima facie case" of discrimination "by a preponderance of the evidence. Burdine, 450 U.S. at 253. If he or she succeeds, the defendant must meet a burden or production by articulating a legitimate, nondiscriminatory reason for its challenged actions. Finally, if defendant meets this burden of production, plaintiff must then prove by a preponderance of the evidence that the asserted reason is a mere pretext for unlawful discrimination. See Burdine, 450 U.S. at 252-56 for a discussion of how these burdens operate. Under Burdine, "the burden of persuading the trier of fact that the defendant intentionally discriminated remains at

all times with the plaintiff." Burdine, 450 U.S. at 253.

In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989), the Supreme Court revisited the question of burdens of production and persuasion in Title VII cases. Six of the justices agreed in Hopkins that the defendant must satisfy a greater burden once plaintiff has proved (apparently by a preponderance of the evidence then before the court) that her gender played a motivating part in an employment decision. In such a case, referred to by the Court as a "mixed motive" case, "the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even

if it had not taken plaintiff's gender into account." Hopkins, 109 S.Ct. at 1795 (plurality op.). This holding in effect transforms the defendant's burden, once plaintiff proves a discriminatory motive, from a burden of production to a burden of persuasion.

All six justices who supported the result in Hopkins were careful to distinguish the mixed motive analysis employed in that case from the pretext analysis set out in McDonnell Douglas and Burdine. See Hopkins, 109 S. Ct. at 1788-89 (plurality), 1795-96 (White, J. concurring in the judgment), and 1801-1805 (O'Connor, J., concurring in the judgment). Justice White, concurring in the judgment and agreeing with the plurality that the Hopkins, 109 S.Ct. at

1788-89 (plurality), 1795-96 (White, J. concurring in the judgment), and 1801-1805 (O'Connor, J., concurring in the judgment). Justice White, concurring in the judgment and agreeing with the plurality that the Hopkins analysis "is not a departure from and does not require modifications of the Court's holdings in [Burdine] and [McDonnell Douglas]", explained:

> 'mixed motive' cases, such as the present one, are different from pretext cases such as McDonnell Douglas and Burdine. In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision.'... In mixed motive cases, ...there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.

109 S.Ct. at 1796 (citation omitted).

Justice O'Connor, also concurring in the judgment, viewed the Hopkins decision as "at least a change in direction from some of our prior precedents." 109 S.Ct. at 1801. She explained that the change was justified in cases like Hopkins where the plaintiff produces direct evidence that the employer has placed substantial reliance on factors whose consideration is forbidden by Title VII. Id. She distinguished direct evidence from "inferential evidence," noting that the McDonnell Douglas and Burdine framework would still apply to cases where only inferential evidence of discrimination was shown by the plaintiff. 109 S.Ct. at 1801-1802.

Justice O'Connor's reliance on the distinction between direct and inferential evidence to separate mixed motive cases from pretext cases recalls the analysis applied by the First Circuit when it heard the appeal in this case. See Fields v. Clark Univ., 817 F.2d 931, 935 (1st Cir. 1987); see also Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir.), cert. denied, 111 S. Ct. 137 (1990). Although the plurality in Hopkins did not highlight the distinction between direct and inferential evidence, it did qualify its analysis with the condition that a plaintiff must first show that gender played a motivating part in the employment decision before the defendant

is called upon to justify that decision. See, e.g., 109 S.Ct. at 1787-88.

I conclude that it is unnecessary, in the present case, to determine whether the distinction between direct and inferential evidence of gender motivation is critical. This is so because I find that plaintiff has not proved in either way that gender was a motivating factor. Thus, plaintiff has not satisfied her first-step burden under either the Hopkins analysis or the McDonnell Douglas analysis.

III.

Despite her contentions to the contrary, plaintiff in this case has not introduced any direct evidence that her gender played a motivating role in defendant's decision to deny her tenure.

Perhaps the most powerful testimony offered b, plaintiff was her recollection of a comment by Stan Gerber, a colleague in the sociology department and one of the department members who voted not to recommend tenure in her case. According to plaintiff, Gerber had told her "that's no way to get tenure around here" the day after she had rebuffed a pass that he made at her. Even if I were to credit this statement as direct evidence of an improper motivation on the part of Gerber in a tenure vote made two years later, I could not find that improper motives on the part of one member of a six member department would constitute direct evidence of an improper motive on the part of the sociology department as

a whole in its unanimous vote to deny tenure. Moreover, the recommendation of the sociology department was only the first stage of a tenure review process that included unanimous concurrence by the COP, the President, the Board of Trustees and the FRC. See Jackson, 900 F.2d at 467 (noting the district court's finding that the role of one allegedly biased member of a tenure review subcommittee was de minimis in the ultimate decision not to offer tenure).

Plaintiff argues that several other pieces of evidence presented in her case constitute "direct" evidence. I do not dwell on them because, viewed most favorably to plaintiff, they fall short of "direct" evidence of gender discrimination by the decisionmaking

entities for the same reasons noted in the next preceding paragraph.

Plaintiff has failed to offer sufficient evidence (whether viewed as direct, or inferential, or both together) that gender was a motivating factor in any of the unanimous decisions against her at each level of the decisionmaking process.

Also, plaintiff's claim fails for the additional reason that defendant's evidence is strong enough to prevail even if plaintiff had succeeded in the first step under either analysis. That is, even if I were to determine that plaintiff had introduced sufficient evidence to show a prima facie case under McDonnell Douglas, or under Hopkins to make this a mixed motive case

rather than a pretext case, I would not ultimately decide for the plaintiff because defendant has introduced sufficient evidence of a legitimate, non-discriminatory reason for its decision to deny plaintiff tenure to satisfy its burden of persuasion even under the Hopkins analysis.

IV.

The first step in the Burdine analysis requires the court to determine whether plaintiff has made a sufficient showing to establish a prima facie case of gender discrimination. Describing plaintiff's initial burden in Burdine, the court explained:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an

> available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

450 U.S. at 253. In making a showing by a preponderance of the evidence that she is qualified to be awarded tenure as part of the prima facie Title VII tenure case, a plaintiff

> need only show that [she] was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [she] need show only that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.

Banarjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1155-56 (D.

Mass. 1980), quoted and aff'd, 648 F.2d 61, 63 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981).

Having weighed the evidence presented by plaintiff in this case, I find that she has not shown by a preponderance of the evidence that she was sufficiently qualified to place her in the middle group of tenure candidates in the sociology department at Clark University. As noted above, plaintiff was denied tenure by unanimous vote at each stage in the tenure review process, and failed to receive support from other men and women on the Clark faculty. Plaintiff's own testimony established that she had difficulties teaching some of the large courses to which she was assigned, and much of plaintiff's

testimony was in the form of argument as opposed to recitation of fact. Defendant has introduced student evaluations and testimony from plaintiff and the defense witnesses showing that her teaching was criticized by several of her students and that the chair of her department told her on numerous occasions that he was receiving complaints from her students.

Just as my decision in this case does not turn on whether or not plaintiff introduced direct evidence of discrimination, so too it does not depend upon whether or not plaintiff made out a prima facie case of discrimination. Were it necessary to proceed to the second and third steps of

the Burdine analysis, plaintiff would nonetheless fail to meet her burden.

Citing plaintiff's poor teaching ability and offering ample evidence to support this assertion, defendant has articulated a legitimate, non-discriminatory reason for denying plaintiff tenure in this case. Plaintiff under these circumstances must establish by a preponderance of the evidence that poor teaching was a pretext for gender discrimination to prevail in her Title VII claim. As noted above, plaintiff has not introduced sufficient evidence to support an inference that poor teaching was a pretext for gender discrimination. Plaintiff's evidence resembles the evidence as described by the district

court in Jackson v. Harvard Univ., 721 F. Supp. 1397, 1400 (D. Mass 1989), aff'd, 900 F.2d 464 (1st Cir. 1990),

> The circumstantial matters reduce to a collection of attenuated, dated, and immaterial incidents and stray remarks, de minim[i]s procedural anomalies, and inapposite comparisons with other tenure candidates.

Plaintiff relies heavily on comparisons with male members of the Clark sociology department to support an inference of discrimination, yet the comparisons do not support such an inference. Plaintiff contends that she was paid less than some of her male colleagues with less experience, that she was given a heavier courseload and that she was denied equal access to secretarial services and office

supplies. All of these contentions were effectively contradicted by the exhibits and three witnesses for the defendant. Despite her testimony to the contrary, I find that plaintiff's salary, courseload and access to services were not affected by her gender and were not significantly disproportionate to the salaries, courseloads and access to services of her comparable male colleagues.

As part of her contention that poor teaching was a pretext for gender discrimination in her case, plaintiff criticizes defendant's reliance on student evaluations to assess her teaching performance. She asserts that defendant did not obtain a representative sampling of her students when they solicited and received

evaluations, that the student evaluations reflect a bias against women professors, and that the student evaluations that were relied upon by defendant and received in evidence are not sufficiently negative to support a denial of tenure. Based on the testimony of Professors Puffer and Koelsch, I find that the reliance on student evaluations to assess teaching performance was appropriate in this case. Further, I find that plaintiff has failed to prove by a preponderance of the evidence that the evaluations solicited and relied upon were an unrepresentative sample, were biased, or were insufficient to support a negative assessment of plaintiff's teaching performance.

The student evaluations collected for purposes of the departmental recommendation and reconsideration by the COP can fairly be characterized as mixed. Though some students were complimentary of plaintiff's effectiveness as a teacher, others were extremely critical. Viewed as a whole, the evaluations support defendant's position that the decision to deny plaintiff tenure was based on her ineffectiveness as a teacher. More than one student described plaintiff as the "worst" teacher they had encountered at Clark, and several referred to her disorganization, lateness and lack of rapport with the students. Though many of the evaluations were positive, the evaluations on the whole were not

sufficiently positive to give rise to an inference that they were improperly relied upon to cover up gender bias as the true cause of the decision to deny plaintiff tenure.

Similarly, plaintiff's comparison of herself with male colleagues in the sociology department who did receive tenure does not support a finding that the denial in her case was a pretext for discrimination. Two of her colleagues, Professors Sampson and Gerber, were reviewed during a period when there was no functioning sociology department at Clark, and before the promulgation of the September 1972 Faculty Handbook that set out the tenure review procedures applicable to plaintiff. Plaintiff emphasizes that Professor Gerber, like

her, had received mixed teaching evaluations, but she neglects to take into account Gerber's service as secretary of the department during a difficult period in 1969-71, as well as the fact that Gerber was the only full-time member of the department during the 1971-72 academic year who was scheduled to return to Clark in the following year.

Plaintiff's comparisons of herself with Professors Peck and Ross, evaluated for tenure in the fall of 1975 and 1977-78, respectively, also fail to support her claim that the decision to deny her tenure was based on gender. In Brown v. Trustees of Boston Univ., 891 F.2d 337, 347 (1st Cir. 1989), cert. denied, 110 S. Ct. 3217 (1990), the First Circuit

discussed the admissibility of comparative evidence in a tenure case to prove that the proffered motive is a pretext for gender discrimination:

> ...a court should realize that comparing the qualifications of others granted tenure with those of plaintiff presents the risk of improperly substituting a judicial tenure decision for a university one. To admit such comparative evidence, the trial court must be satisfied, and we must later be satisfied on appeal, that the evidence is so compelling as to permit a reasonable finding of onesidedness going beyond a mere difference in judgment.

891 F.2d at 347. Plaintiff has not demonstrated on the evidence before the court that her qualifications were sufficiently superior to those of her male colleagues to make the comparison compelling or one-sided. On the

contrary, she has shown at best that some of her male colleagues were criticized for their teaching respective tenure reviews. Plaintiff's qualifications for tenure were not strong enough and the qualifications of her colleagues were not sufficiently weak to support an inference that poor teaching was a pretext for gender discrimination in plaintiff's case.

V.

In making my determination that plaintiff has failed to establish that the decision not to offer her tenure was influenced by gender discrimination in violation of Title VII, I have not relied in any way on the affidavits of Marcia Savage, Stanford Gerber, Seymour Wapner or Alan Guskin. In my Memorandum

and Order of February 8, 1991, I deferred ruling on plaintiff's motion for leave to cross-examine these witnesses or to strike their affidavits until I had determined whether there was a need to consider these affidavits as support for defendant's case. Having found it unnecessary to consider the identified affidavits, I conclude that cross-examination of the identified witnesses would be futile and would result in a waste of the resources of the court and the parties. The motion for leave to cross-examine these affiants is dismissed as moot.

s/Robert E. Keeton
United States District Judge

UNITED STATES COURT OF APPEALS
For the First Circuit

#86-1989 RONA M. FIELDS,
Plaintiff, Appellee,
v.
CLARK UNIVERSITY,
Defendant, Appellant.

#86-2036 RONA M. FIELDS,
Plaintiff, Appellant,
v.
CLARK UNIVERSITY,
Defendant, Appellee.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS
[Hon. Walter Jay Skinner,
U.S. District Judge]

Before
Coffin, Bownes and Selya,
Circuit Judges.

John O. Mirick with whom Joseph M. Hamilton and Mirick, O'Connell, DeMallie & Lougee were on brief for Clark University.

Christine L. Owens with whom Winn Newman and Newman, Sobol, Trister & Owens were on brief for Rona Fields.

May 8, 1987

BOWNES, Circuit Judge. In this opinion we consider both the plaintiff's and defendant's appeals from a district court order in a suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1982). The court found that the process by which plaintiff was denied tenure at Clark University was tainted with sexual discrimination. It did not order that she be granted tenure, however, because the court also found that she failed to prove she was so entitled. It ordered that plaintiff be reinstated for a two-year probationary period and then reconsidered for tenure, and awarded her back pay, attorney's fees, and costs. We hold that the court erred in its allocation of the burdens of proof, and,

therefore, vacate the court's order and remand the case for a new trial.

I. BACKGROUND

In 1972, Clark University hired Rona Fields as a full-time associate professor in the sociology department. She was considered for tenure after her second year of teaching. At the initial stage of the review process, six members of the sociology department, all male, voted unanimously to recommend that she not be given tenure. Fields contested this decision. She submitted additional materials on her own behalf at subsequent meetings, but on review the members of the department unanimously affirmed their decision, and the president of the university was notified of the outcome.

The departmental vote was referred to the committee on personnel, which is charged with advising the university's president on evaluations of the faculty's professional credentials. The committee reviewed the file on which the faculty relied, which was supplemented by materials Fields submitted. It also obtained additional student evaluations of her teaching. The committee voted twice--each time unanimously--to accept the faculty's recommendation, and it forwarded this decision to the board of trustees. The committee denied a request for consideration by Fields.

On May 9, 1975, the board of trustees voted to give Fields a one-year terminal appointment ending August 31, 1976. She asked the university to form

a faculty review committee to examine the decision, alleging a number of procedural irregularities and charging sexual bias. Such a committee was appointed in June 1975; it convened in January 1976 and held a number of meetings. It reported that there was no evidence Fields was denied tenure because of sexual bias, and concluded that the sociology department, the committee on personnel, and the board of trustees had adequately considered her case.

Fields filed charges with the Equal Employment Opportunity Commission and the Massachusetts Commission Against Discrimination, claiming that the tenure decision constituted unlawful discrimination. The Equal Employment

Opportunity Commission found reasonable cause to believe the allegations and issued a right to sue letter. Fields subsequently instituted this action in district court.

The allegations of sexual discrimination focused on the all-male sociology department. According to Fields, the members of the department subjected her to "a continuous course of sexual harassment, sexual innuendo and denigration of her professional status." She claims an associate professor who had just been awarded tenure made sexual advances toward her, and when she rejected them, he warned that her refusal "was no way to get tenure." This associate professor later participated in the departmental vote

recommending that Fields be denied tenure.

The university, on the other hand, claims that the sociology department's negative recommendation, and the university's decision not to grant Fields tenure, were made because she was a poor teacher. To substantiate its claim, the university relied principally on student evaluations and the comments of other professors, some solicited by Fields, which criticized her teaching.

After a non-jury trial, the district court found that the sociology department "was generally permeated with sexual discrimination of which the plaintiff was in fact a victim." It did "not find any evidence of improper bias in the subsequent review procedure or on

the part of the ultimate deciding authority, the board of trustees." It concluded that the departmental recommendation "was the most significant step in the tenure process," and that she had "proved by preponderance of the evidence" that the sociology department's sexual bias rendered the tenure decision "impermissibly infected with sexual discrimination, and accordingly, she is entitled to relief under Title VII."

The court also said, however, that Fields had "not proved that on this record she is entitled to tenure." It found that "the record raises substantial questions as to the plaintiff's capacity as a teacher." It noted testimony that student evaluations

of her teaching were usually negative. There was evidence that a female tenured faculty member said she could not recommend that Fields be granted tenure. The female dean of women also gave a negative recommendation, and she reported many complaints about the way Fields taught. The court ordered the university to reinstate Fields for a two-year probationary period and to reconsider her for tenure afterward "under circumstances free of sexual discrimination." She was also awarded $25,000 back pay and $75,697.72 in attorney's fees and costs.

Fields argues that the court misallocated the burdens of proof. According to her, she was entitled to reinstatement with tenure and full back

pay. She also claims the court erred in reducing the hourly rate at which her lead counsel's attorney's fees were computed. The university cross-appeals, also claiming that the burdens of proof were incorrectly applied and that it was entitled to a verdict. Additionally, the university claims that the court erred by allowing an associate professor, who was hired in the sociology department after Fields left, to testify about sexual harassment occurring four years after Fields was denied tenure. Lastly, Clark alleges that the damage award and the computation of attorney's fees were flawed in various respects.

II. BURDENS OF PROOF

Fields claims the court's ruling that the tenure decision was "impermissibly infected with sexual discrimination" meant that she carried her burden of persuasion. She argues that the burden then shifted to the university to prove that, even if there had been no discrimination, she would not have been granted tenure. The university claims that the burden of persuasion remained at all times on Fields, and that the court's conclusion that she failed to prove she was entitled to tenure required a defendant's verdict.

Title VII prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin

in hiring and with respect to the privileges and conditions of employment. 42 U.S.C. § 2000e-2(a). A plaintiff does not have to present direct proof of discriminatory motive to prevail in a Title VII suit. A plaintiff can establish a prima facie case of discrimination if she "prove[s] by a pr[e]ponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Supreme Court set out the order and allocation of the burdens of proof for such a case in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973):

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 252-53 (citations omitted) (quoting McDonnell Douglas, 411 U.S. at 802). "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff

[has] his day in court despite the unavailability of direct evidence.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)[4]). When an adverse employment decision has been made under circumstances that raise an inference of discriminatory treatment, the employee is entitled "to an explanation from the defendant-employer for whatever action was taken." Loeb v. Textron, Inc., 600 F.2d at 1014. This court has applied the McDonnell Douglas approach in a line

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[4]Loeb v. Textron, Inc., was based on a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985); but the McDonnell Douglas test is followed to the same extent under that statute as under 42 U.S.C. § 2000e-2(a).

of Title VII cases arising in an academic setting. See, e.g., Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1, 9 (1st Cir. 1985), cert. denied, 106 S. Ct. 1496 (1986); Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir.), cert. denied, 454 U.S. 1098 (1981); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 108 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

The burden of proving a prima facie case can be met "by showing that a qualified applicant, who was a member of a [protected class], had unsuccessfully sought a job for which there was a vacancy and for which the employer continued thereafter to seek applicants with similar qualifications."

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357-58 (1977); McDonnell Douglas, 411 U.S. at 802. The district court did not rule specifically on whether Fields made out a prima facie case under the McDonnell Douglas approach. To show that she was qualified for tenure and satisfy the second step of the prima facie case, Fields must have shown that her qualifications were such that a decision granting tenure would have been a reasonable exercise of discretion. Banerjee v. Board of Trustees of Smith College, 648 F.2d at 62-63. Even if Fields did so, "[t]he burden on the defendant is only to rebut the plaintiff's prima facie case; the burden of persuasion rests at all times with

the plaintiff." Holden v. Commission Against Discrimination, 671 F.2d 30, 35 (1st Cir.), cert. denied, 459 U.S. 843 (1982). The defendant need only "articulate some legitimate, nondiscriminatory reason" for its decision. McDonnell Douglas, 411 U.S. at 802. The university articulated such a reason--poor teaching--and produced evidence, chiefly in the form of student evaluations and faculty recommendations, to substantiate it. Under McDonnell Douglas, the burden would then be on Fields to prove by a preponderance of the evidence that this reason was a mere pretext for sexual discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253. The district court did not go through this analysis,

and it is unclear what its finding would have been on the question of pretext, for while the court found that "the record raises substantial questions as to the plaintiff's capacity as a teacher," the court also found that "two male faculty members with poor teaching evaluation . . . one with less scholarly achievement than the plaintiff, were accorded tenure after a favorable vote from the department."

The question here, however, is not how McDonnell Douglas should be applied, but whether it should be applied at all. The court did not grant a verdict for the defendant because it found "strong evidence of a pervasively sexist attitude on the part of the male members of the sociology department." If this

meant Fields had proved by direct evidence that sexual discrimination was a motivating factor in the decision to deny her tenure, the court was correct in not following the McDonnell Douglas test. It erred, however, in its subsequent rulings.

The Supreme Court has instructed that the shifting burdens of proof set forth in McDonnell Douglas are "inapplicable where the plaintiff presents direct evidence of discrimination." Trans World Airlines, Inc. v. Thurston, 469 U.S. at 121; see also Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3d Cir. 1985) ("The presumptions and shifting burdens are merely an aid--not ends in themselves. When direct evidence is available,

problems of proof are no different than in other civil cases."), cert. granted, 107 S. Ct. 568 (1986); Blalock v. Metals Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985) (collecting authority supporting the position that the shifting burdens of McDonnell Douglas do not apply if there is direct proof of discrimination); Miles v. M.N.C. Corp., 750 F.2d 867, 875 (11th Cir. 1985) ("The McDonnell Douglas method of proving an employment discrimination case, however, pertains to situations where direct evidence of discrimination is lacking."); Bell v. Bermingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983) ("[W]here a case of discrimination is proved by direct evidence, it is incorrect to rely on a McDonnell-Douglas

rebuttal."), cert. denied, 467 U.S. 1204 (1984); Nanty v. Barrows Co., 660 F.2d 1327, 1333 (9th Cir. 1981) ("The McDonnell Douglas rule that the ultimate burden of proof remains on the plaintiff is not applicable after unlawful discrimination has been proven.").

Nevertheless, a plaintiff who has established that unlawful discrimination was a motivating factor in an employment decision is not necessarily entitled to relief under Title VII. The statute forbids the courts to "require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was

suspended or discharged for any reason other than discrimination." 42 U.S.C. § 2000e-5(g) (emphasis added). Therefore, before the court could order that Fields be reinstated or paid back salary, the cause of the tenure decision had to be determined. She is not entitled to such relief solely on the basis that the decision was infected with discrimination. But discrimination need not be the sole reason for an adverse job decision for a plaintiff to be entitled to Title VII relief; "no more is required to be shown than that [it] was a 'but for' cause. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976).

The question, which is one of first impression in this circuit, is whether a

plaintiff who has proved by direct evidence that unlawful discrimination was a motivating factor in the employment decision must also prove that it was a "but for" cause. Based on our review of the law, we conclude that the McDonnell Douglas format should not be slavishly followed and that, after such proof by the plaintiff, the defendant must prove that the same decision would have been made absent the discrimination. See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc); Blalock v. Metals Trades, Inc., 775 F.2d at 711 (6th Cir.); Miles v. M.N.C. Corp. 750 F.2d at 875-76 (11th Cir.); Caviale v. State of Wis., Dep't. of Health and Social Servs., 744 F.2d 1289, 1296 (7th Cir. 1984); Smallwood v.

United Air Lines, Inc., 728 F.2d 614, 620 (4th Cir.), cert. denied, 469 U.S. 832 (1984); Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980); Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (per curiam).

The logic of such an approach is inescapable. The employer is in the best position to prove which of its motives were determinative. As Justice Scalia said while on the District of Columbia Circuit, "it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor." Toney v. Block, 705 F.2d 1364,

1366 (D.C. Cir. 1983). Furthermore, as the Supreme Court has explained in the context of unfair labor practices,

> [t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983.

Several Supreme Court decisions strongly imply that the burden should be on the employer to prove that its unlawful discrimination was not the "but for" cause of its decision. In Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the

respondent, who was a teacher, alleged that his constitutional rights were violated when the school board refused to renew his contract. He said he was not rehired because of a public statement he had made, and there was direct evidence this impermissible reason played a substantial part in the decision not to renew his contract. Id. at 284. The court said that once the plaintiff carried his burden of showing that an impermissible reason was a "motivating factor," "the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as a respondent's reemployment even in the

absence of the protected conduct." Id. at 287.

In Hunter v. Underwood, 471 U.S. 222 (1985), the Court approved the Ninth Circuit's shifting of the burden of proof to the defendant in a case alleging a statute was unconstitutional because it was racially discriminatory. The Court said: "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." Id. at 228. The Court cited to its decision in Mt. Healthy, which placed the burden of proof by a preponderance of the evidence

on the defendant. Id. (citing Mt. Healthy, 429 U.S. at 287).

In NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), this court addressed whether an employer should have the burden of proving that an employee was discharged for legitimate reasons when there was evidence that he was illegally fired on the basis of his union activities. We suggested that in the presence of a clear violation of the law it may be appropriate to require a wrongdoer to prove that notwithstanding the violation its decision was justified. Id. at 906. We, however, rejected the National Labor Relations Board's allocation of the burden of proof, which placed the burden

of persuasion on the employer when there was proof of a forbidden motive. Id. at 906-07. The Supreme Court later held that the National Labor Relations Board's position was justified. NLRB v. Transportation Management Corp., 462 U.S. 393, 400-01; see also id. at 400 n.5 (distinguishing the McDonnell Douglas approach because it addressed "only the situation in which the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision"). The Court, therefore, in addition to instructing that McDonnell Douglas does not apply when there is direct evidence of discrimination, has recognized the logic of placing the burden on the defendant

to avoid liability in similar circumstances.

We hold that when a plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the burden is on the employer to prove by a preponderance of the evidence that the same decision would have been made absent the discrimination. We recognize that some courts have required the defendant to carry its burden of proof by "clear and convincing" evidence. See, e.g., Smallwood v. United Airlines, Inc., 728 F.2d at 620 (4th Cir.); Marotta v. Usery, 629 F.2d at 618 (9th Cir.); Day v. Mathews, 530 F.2d at 1085 (D.C. Cir.). Others require proof by a preponderance of the evidence. See,

e.g., Bibbs v. Block, 778 F.2d at 1324 & n.5 (8th Cir.); Blalock v. Metals Trades, Inc., 775 F.2d at 711 (6th Cir.); Miles v. M.N.C. Corp., 750 F.2d at 875 (11th Cir.). Because of the difficulties inherent in proving what might have been done in a hypothetical situation, we think the test usually applied in civil cases--preponderance of the evidence--is the appropriate one. Moreover, this is the test employed by the Supreme Court in Mt. Healthy, a case in which constitutional rights were at stake, and the Court fashioned the procedure by which a defendant could prove "that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 287.

We see no reason to adopt a more demanding test in this context.

The district court's finding that sexual discrimination "impermissibly infected" the decision not to grant Fields tenure appears to us to be the equivalent of a finding that she proved by direct evidence that discrimination was a motivating factor in the decision. This finding cannot be reconciled with the court's putting the burden on Fields to prove that she was entitled to tenure. Therefore, the court erred in its allocation of this burden of proof. The court also erred by reinstating Fields for two years and awarding back pay without finding that the university, after having been afforded the opportunity to prove Fields would not

have been granted tenure absent discrimination, failed to carry its burden of proof. We, therefore, remand the case for a new trial on all issues by another district court judge.[5]

Vacated and remanded for proceedings consistent with this opinion.

No costs.

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[5]Because we remand for a new trial, we do not decide the other issues raised in this appeal: whether testimony about sexual harassment occurring after the tenure decision was admissible, whether the damages award was proper, and whether the attorney's fees were adequate.

UNITED STATES COURT OF APPEALS
DISTRICT OF MASSACHUSETTS

RONA M. FIELDS, Plaintiff	)	
v.	)	CIVIL ACTION NO. 80-1011-S
CLARK UNIVERSITY, Defendant	)	

FINDINGS, RULINGS AND ORDER

March 14, 1986

SKINNER, D.J.

In this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the plaintiff charges that she was denied tenure by the defendant university as a result of discrimination because of her sex.

The plaintiff was hired as an associate professor in the department of sociology in the spring of 1972 and

started work in the fall. Her tenure review was postponed until the end of her second year of teaching. On October 18, 1974, the six male members of the department of sociology voted 6-0 to deny tenure. One of the members who voted against the plaintiff was not present at the meeting at which her case was discussed, and submitted this vote by mail prior to the meeting.

The plaintiff contested this decision and asked and received permission to submit additional materials in her favor, which she did at three subsequent meetings with the departmental faculty in November of 1974. On November 19, the chairman of the department informed her that the judgment of the department remained the

same. On the same day he also notified the president of the university of the unanimous vote of the department.

In accordance with university procedure, the negative vote was referred to the Committee on Personnel ("COP"), which reviewed all the material in the plaintiff's file, gathered additional student evaluations, and received further materials from the plaintiff. By two successive unanimous votes, COP accepted the recommendation of the sociology faculty and so advised the Board of Trustees. The plaintiff moved for reconsideration, but COP voted to deny reconsideration. The Board of Trustees voted on May 9, 1975 to give the plaintiff a one-year terminal appointment, having concluded that she

had not been the victim of any procedural violations or sexist bias.

The plaintiff then requested a faculty review committee be established to examine whether the denial of tenure was tainted with bias or the result of improper procedure. This committee convened in January, 1976, and held a number of meetings. The plaintiff was present at two of these meetings, as was the university affirmative action compliance officer. On June 15, 1976, this review committee concluded that there was no evidence of bias and that the plaintiff's case had been adequately considered by the sociology department, the COP and the Board of Trustees.

The plaintiff then filed timely complaints with the Massachusetts

Commission Against Discrimination and the Equal Employment Opportunities Commission ("EEOC"). After investigation, the EEOC ruled that there was reasonable cause to credit plaintiff's allegations of sex discrimination, and on March 5, 1980 issued a 90-day "right to sue" letter. This action was thereafter timely filed.

In this action, the defendant has sought to justify denial of tenure to the plaintiff because of her lack of competence as a teacher. This has consistently been the position of the sociology department and each of the succeeding review committees. The Faculty Handbook published by the university establishes four criteria for tenure; scholarship (primarily evidenced

by publications), effective teaching, significant contribution to the university through committee work and similar services, and seniority. Of these criteria, the university administration considered effective teaching the most important. While the plaintiff's scholarship and contributions to the university were adequate, they were deemed by these various reviewing groups not to be so outstanding as to overcome the deficiencies in her teaching.

In support of the collective opinion that plaintiff was a poor teacher, the defendant offers a group of student evaluations. A few of these, particularly from the students in the plaintiff's seminars, are wildly

enthusiastic about plaintiff's enthusiasm, commitment and presentation. A few are ambivalent. A considerable number are extremely negative, particularly with reference to the large lecture classes in basic courses in sociology. The students complain that the plaintiff's courses were disorganized, that there was no correlation between reading assignments and the course work and that the plaintiff herself was often unprepared and unresponsive to students' needs. One student said that plaintiff's performance was so bad that it was a principal reason for her leaving the university. The plaintiff attacks the use of the student evaluations because they were not gathered or evaluated

according to accepted standards of scientific polling. She is probably correct. The use made of the student evaluations in her case, however, followed the practice at the defendant university in other tenure decisions and was substantially the same as that described in Kumar v. Board of Trustees, University of Massachusetts, 774 F.2d 1 (1st Cir. 1985).

Up to this point the case is strikingly similar to Kumar, and the facts stated would require a judgment for the defendant under the standards announced in that case. There is, however, a critical distinction. In Kumar there was no evidence of any improper bias infecting the decision

making process.[6] In this case there is strong evidence of a pervasively sexist attitude on the part of the male members of the sociology department, the same people who made the basic decision to deny tenure to the plaintiff. There was also evidence that male members of the sociology faculty had been awarded tenure with similar teaching evaluations.

The plaintiff testified to a continuous course of sexual harassment, sexual innuendo and denigration of her professional status because of her sex by the male faculty members of the

---

[6]In Kumar, also, the faculty manual called for "excellence" in teaching, scholarship and contribution to the community, an amplification of these criteria not present in the defendant's manual.

department of sociology. On one occasion, one of her colleagues drove her home from a meeting and made a pass at her in the car, which she rebuffed. In reference to this occurrence, he later said, "That's no way to get tenure around here", or words to that effect. Only the last mentioned incident was denied by a witness for the university, and he was not persuasive. Even allowing for the plaintiff's feminist advocacy and propensity to project a view of herself as a victim,[7] I accept the substance of the plaintiff's testimony. I find that the department of sociology was generally

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[7]Upon being asked on cross-examination to read a document, she said "You're taking advantage of my disability, Mr. Myrick".

permeated with sexual discrimination of which the plaintiff was in fact a victim.

I do not find any evidence of improper bias in the subsequent review procedure or on the part of the ultimate deciding authority, the board of trustees. It is not necessary for the plaintiff to prove that the board of trustees or the COP was biased in order to prevail, however, if sexual discrimination was a significant factor in the course of events which led to the denial of tenure. DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980).

In my opinion, the vote of the faculty of the department of sociology was the most significant step in the tenure process. The plaintiff labored

thereafter under the burden of being an appellant, seeking to get higher authority to give her tenure in a department which had unanimously rejected her. I note that two male faculty members with poor teaching evaluation, Gerber and Peck, one with less scholarly achievement than the plaintiff, were accorded tenure after a favorable vote from the department.

The actual evaluations for Gerber and Peck are no longer in existence so that I cannot make a comparison between the plaintiff's evaluation and theirs. The committee reports show, however, that, like the plaintiff, they were considered poor performers in their large classes.

On the defendant's side, there were comments by Professors Guskin and Sampson that the student evaluations of the plaintiff were unusually negative and went further than the usual student complaints. Furthermore, the female dean of women reported many complaints about the plaintiff's teaching and urged that she not be given tenure. A female faculty member also urged the COP to refuse tenure on the basis of her observation of the plaintiff's mismanagement of her large lecture classes.

There were also negative comments about the quality of the plaintiff's scholarship and the consistency of her commitment to the community. I have generally disregarded them, however,

because the defendant's basic justification for its tenure decision is the deficiency in plaintiff's teaching.

The plaintiff has not proved that on this record she is entitled to tenure. In my opinion, however, she has proved by a preponderance of the evidence that the decision to deny her tenure was impermissibly infected with sexual discrimination, and accordingly, she is entitled to relief under Title VII of the Civil Rights Act of 1964 as amended.

Because the record raises substantial questions as to the plaintiff's capacity as a teacher, I hesitate to impose her services upon the university for the rest of her working life. What she is entitled to, in my

opinion, is the opportunity to have the issue of her tenure determined on the merits without being discriminated against on the basis of sex.

I therefore order that the defendant rehire the plaintiff on a probationary basis for two years and at the end of that period renew the tenure decision process under circumstances free of sexual discrimination. I recognize that by this order I place the plaintiff's career in the hands of some of the same people who dealt with it before. In the intervening decade, however, there have been additional appointments of women to the faculty, and there undoubtedly is a very significant general increase in the

acceptance of and respect for women in the learned professions.

In addition, the defendant shall pay to the plaintiff the difference between the salary she would have received as an assistant professor at the defendant university less her adjusted gross income (not counting investment income) for each year from June, 1976 to the present, but in any case no more than $25,000 in the aggregate.

Plaintiff's counsel shall submit a proposed form of decree.

s/Walter Jay Skinner
United States District Judge

Equal Employment Opportunity Commission
District Office
150 Causeway Street
Boston, Massachusetts 02114
617-223-4535

In reply refer to:
Charge No. 011760003
State No. 75 WEM0036

Rona Fields
Charging Party
222 East DelRay Avenue
Alexandria, Virginia 22301

Clark University
Respondent
950 Main Street
Worcester, MA 01610

DETERMINATION
(April 5, 1979)

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral, and all other jurisdictional requirements have been met. Charging Party alleged that Respondent Employer has discriminated against her in violation of Title VII of the Civil Rights Act of 1964, as amended, in terms and conditions of employment, tenure, and discharge because of her sex (female). Charging Party also alleged that Respondent discriminated against her with respect to hiring, wages and intimidation/reprisal because of her sex. Respondent denies that the allegations are true.

Charging Party asserts that she was disparately treated in terms and

conditions of employment when compared to similarly situated male employees. Charging Party further asserts that her sex was a factor in her tenure consideration and denial. Respondent contends that Charging Party's denial of tenure was in accordance with tenure procedures then in effect and denies any violation of Title VII as alleged by the Charging Party.

The evidence of record demonstrates that Charging Party was disparately treated and that the treatment was due, at least in part, because of her sex. For example, Respondent admits that Charging Party was given larger class loads than other male professors and that she was denied adjunct status by the Psychology

Department and replaced by a male with less academic rank and experience. Respondent's explanation for the adjunct status denial does not withstand scrutiny because of Charging Party's superior qualifications, and Respondent failed to give an explanation for the larger class load. Respondent denied Charging Party tenure because of her unsatisfactory teaching effectiveness, but relied solely on unvalidated student evaluations and failed to provide a teaching evaluation independent of student opinion. Respondent's subjective application of its tenure procedures had the foreseeable effect of causing Charging Party's discharge from Respondent's Sociology Department.

The Commission has many times held in situations such as this that where a Charging Party is qualified for continued employment and is rejected, and Respondent's asserted reasons for rejection fails to withstand scrutiny or fails to support its actions, it is reasonable to conclude that the Charging Party's sex was at least a factor in the rejection. Therefore, based on the evidence and the record as a whole, the Commission finds reasonable cause to credit the terms and conditions of employment, tenure, and discharge allegations on the basis of sex (female). Because of a lack of evidence, the Commission withholds a determination on the remaining allegations.

Having determined that there is reasonable cause to believe the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. The parties may indicate their willingness to enter into a settlement discussion by completing the enclosed invitation and returning it to this office in the self addressed envelope within ten (10) days of receipt of this letter.

On behalf of the Commissioner

April 5, 1979
DATE

s/Edward Mercado
EDWARD MERCADO
DISTRICT DIRECTOR

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * *

RONA FIELDS

vs.

CLARK UNIVERSITY

CIVIL ACTION
NO. 80-1011-K

Courtroom No. 11
Thursday,
December 20, 1990

* * * * * * * * * * *

TRANSCRIPT OF NON-JURY TRIAL
DAY 2
BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Timothy J. Willette, RPR-CM
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U.S. District Court
1201 USPO & Courthouse
Boston, Massachusetts 02109
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Q. Could you tell us whether or not you had any incidents with Dr. Gerber.

A. Yes.

Q. Could you describe those incidents by first of all telling us, if you can, the dates.

A. Yes. The major incident with Dr. Gerber occurred in April of 1973. That's the identifiable time. There were earlier incidents in which he made comments about my shape, the clothes I wore, and said that -- well, he said, "I find you very sexy.

MR. PATTON: Your Honor, really, move to strike this testimony as outside the scope of the pleadings. There is no sexual harassment claim in this case. There was an attempt made to amend the pleadings since we were last here which has been denied.

THE COURT: Well, I will receive it provisionally. It's not going to be relevant unless you tie it up with the claim that's made in the complaint.

MR. GOLDER: I --

THE COURT: You may proceed.

MR. GOLDER: Thank you.

A. All right. In April we were in the process of --

Q. Of what year?

A. April of '73. We were in the process of deciding on a new addition to the department and in February began the first real contact that I had with Stan Gerber in working with him on a subcommittee of the department. We were involved in reviewing applicants for the prospective job and he had originally reviewed the applications and not found any women amongst the applicants who were

qualified candidates. So I asked him directly at the department meeting to please allow me to serve on that committee and go through the applications and try to find qualified women and minorities, and he made a comment about how he would enjoy working very closely with me that was derisory, and everybody smiled.

Q. Were you the only woman in this meeting?

A. Yes, yes. And -- anyway, so we'd gone through this process and I really went through the applications myself and I did find a couple of qualified women and some qualified minorities for -- it was an assistant professorship -- and we'd gotten to the point where the department was going to meet, just the faculty, to discuss the candidates. And we were going to meet at Bob Ross's house, which was in Southborough, as

was Ed Sampson's and mine.

And Stan Gerber had difficulty finding his way around places. He didn't read maps. And I lived just off Route 9 and it was sort of on the way to where Ross and Sampson lived. And so he could find his way to where I lived, he was going to leave his car there and proceed with me to Ross's house for the meeting -- I drove -- and we did.

And we had the meeting and I believe there was -- there were drinks served, and Stan was -- he'd had a lot to drink and he was -- he gave signs of being inebriated. I had to drive him back to my place to get into his car, which was in my garage, and it was then when I tried to go into the house that he pushed himself against me, rubbed himself and started saying all kinds of things and trying to unbutton my clothes. And I pushed

him very, very hard -- he's smallish -- and he fell back away from the door long enough for me to get inside and lock it.

The next day he came into my office, and with the door open he just walked in and said in a very loud voice, "That's not the way to behave if you want tenure around here."

Q. Were there any witnesses to that other than yourself and Dr. --

A. I thought that my student assistant had heard it -- that was Elaine Patrick -- and she did react to it. I know that other students must have heard it.

Q. Try to describe what happened between you and Dr. Gerber.

A. Well, he stood very close to the door with the door open. And these are very flimsy office divisions anyway. I mean, even

with the doors closed you could hear what's happening in the next office.

Q. Could you describe any other incidents that occurred between you and Dr. Gerber.

A. Well, this one -- in this case, when he said that, I got very, very angry and I came out from behind my desk and I remember he was standing there. And I said, "Don't you dare talk to me like that." And I also said that if -- if I wanted to get a job that way, I could have been a movie star. I didn't have to be a college professor. And he said, "Well, I'm warning you." And, you know, I kept going towards him, you know, and I was furious, and he kept backing off and he went out the door at that point. I slammed the door shut after him very, very loudly.

Later, not immediately, but later in a conversation with Ed Sampson, I told him what

had happened. There was no place else I could go with it at that time. There was no affirmative action officer in the place. There were no guidelines in place.

Q. Was anybody there besides you and Dr. Sampson when you had this conversation.

A. No.

Q. How soon after the incident did you have the conversation with Dr. Sampson?

A. It was within the next couple of weeks.

Q. What did you say to him, what did he say to you?

A. I told him what had happened. I said that I was very, very upset with Stan Gerber's behavior and Ed said something about, "Well, he was probably drunk." And I said, "It doesn't matter, you know, if he was drunk. That was a terrible thing to do." And Ed left and he said, "Which of us would

you prefer?" And I just walked out of the office at that point. I coulnd't -- I just walked out.

(2)

Supreme Court, U.S.
FILED
DEC 11 1992
OFFICE OF THE CLERK

No. 92-809

In the Supreme Court of the United States

OCTOBER TERM, 1992

RECEIVED
DEC 14 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RONA M. FIELDS,
PETITIONER,

v.

CLARK UNIVERSITY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT CLARK UNIVERSITY IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-809

RONA M. FIELDS,
PETITIONER,

v.

CLARK UNIVERSITY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT CLARK UNIVERSITY IN OPPOSITION

The respondent, Clark University, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 966 F.2d 49 (1st Cir. 1992).

STATEMENT OF THE CASE

Petitioner was employed as a full-time associate professor in the Department of Sociology at Clark University ("Clark") from 1972 through 1976. In this capacity, petitioner taught

courses in female studies, research methods and social psychology.

Petitioner was considered for tenure at Clark in the 1974-75 academic year. In accordance with the procedures then in effect, the six members of the Sociology Department met and considered whether to recommend petitioner for tenure on the basis of the four criteria specified in the University's faculty handbook: scholarship, teaching, service to the College and length of service. The Department obtained written evaluations of petitioner's scholarly work from outside "referees" who were not affiliated with the University, and likewise obtained written evaluations of petitioner's teaching performance by contacting students identified by petitioner and by conducting a random sampling of students who had enrolled in her courses.

In October 1974, the six members of the Sociology Department unanimously recommended to the University's Committee on Personnel ("COP") against tenure for petitioner. The members explained that their recommendation was based on the unusual intensity of the negative comments they had received from students regarding petitioner's teaching performance, many of which comments had noted a sense of haste, disorganization, and lack of preparation on petitioner's part regarding course content, assignments, course procedures and grading. The members also stated that petitioner's written work lacked depth and focus, and was marked by the same type of disorganization that characterized her teaching performance.

After being apprised of the Sociology Department's unanimous recommendation against tenure, petitioner exercised her right to request the Department to review its decision. Pursuant to that review, petitioner asked the Department to obtain written references from three Clark faculty members and one of her former students. Two of the three faculty references named by petitioner, as well as petitioner's lone student reference, declined to endorse petitioner's candidacy for

tenure. In addition, during the Department's review, Assistant Dean of Students Sheila McCann advised the Sociology Department that she could not support petitioner's candidacy in light of the numerous student complaints that had been registered about petitioner's teaching performance. After further deliberations on petitioner's case, the Sociology Department faculty met on November 15, 1974 and voted unanimously to uphold its original decision not to recommend tenure.

Following the Department's recommendation, petitioner's tenure file was submitted to the University's COP. The COP is composed of nine elected members of the faculty, and is responsible for evaluating the qualifications of all tenure candidates and making final recommendations to the President of the University.

Prior to the COP's evaluation of petitioner's qualifications, Dean of the College Frank Puffer reviewed petitioner's tenure file. Following his review, Dean Puffer concluded that the Sociology Department had complied with proper University procedures in evaluating petitioner's qualifications. However, since petitioner had complained about the methods used by the Sociology Department to obtain student evaluations, Dean Puffer recommended that the COP conduct a further survey of University students to ensure that petitioner's teaching performance had been fairly evaluated.

The COP approved Dean Puffer's recommendation, and, accordingly, additional student evaluations of petitioner's teaching record were obtained in February 1975. The overall content of the additional student evaluations submitted to the COP was substantially similar to the content of the evaluations previously obtained by the Sociology Department. For instance, in the evaluations submitted to the COP, students criticized petitioner for her highly disorganized courses, incomprehensible lectures, unavailability to and hostility toward students, and arbitrary work assignments.

In reviewing petitioner's qualifications for tenure, the COP requested the University's academic deans to submit their recommendations regarding petitioner's candidacy. Both Dean of the College Frank Puffer and Dean of the Graduate School Vernon Ahmadjian expressed the judgment that petitioner lacked the necessary qualifications for tenure. Dean Puffer advised the COP that, based upon the negative student evaluations submitted to the Sociology Department and the COP, he had concluded that petitioner's level of teaching performance was significantly below the minimum standards required by Clark.

On March 25, 1975, the COP voted unanimously (9 to 0) not to recommend tenure for petitioner. The COP's negative decision was based upon petitioner's unsatisfactory teaching record. Consistent with the COP practice of requiring two successive votes in all personnel actions, the COP met again on March 28, 1975 and unanimously reaffirmed its negative tenure recommendation. In early April 1975, petitioner requested the COP to reconsider its negative tenure recommendation. After further deliberations and meetings on petitioner's tenure case, the COP voted unanimously on two successive occasions not to reconsider its negative tenure recommendation.

In May 1975, the University's Board of Trustees affirmed the COP's negative tenure recommendation. Shortly thereafter, in June 1975, petitioner requested that a Faculty Review Committee ("FRC") be constituted to examine the University's negative tenure decision. In accordance with petitioner's request, a four member FRC was constituted to examine petitioner's charges that (a) her qualifications had been inadequately and unfairly reviewed, (b) she had been discriminated against on account of her sex, and (c) her failure to receive tenure constituted a violation of her "academic freedom."

After completing its investigation of petitioner's allegations, the FRC issued a report of its findings in June 1976. The FRC unanimously concluded that the procedures followed by the

University during petitioner's tenure review were sufficient to allow adequate consideration of her case in accordance with University standards. The FRC also unanimously agreed that petitioner's allegations regarding sex bias were without merit, and that petitioner had failed to establish that the teaching and research standards invoked in her case had been applied with less stringency in other tenure cases. Finally, the FRC unanimously concluded that petitioner had not submitted any *prima facie* evidence regarding the charge that her academic freedom had been violated.

Thereafter, in May 1980, petitioner filed a complaint against Clark in the United States District Court for the District of Massachusetts, alleging that the denial of tenure to her had been based on her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq*. Following extensive discovery, a trial was held without a jury in September 1985. On March 14, 1986, the Court (Skinner, J.) found that there was no evidence of improper bias in the procedures of the COP or the University's Board of Trustees, and also found that petitioner had "not proved that on this record, she is entitled to tenure." Pet. A. 105. However, the Court concluded that there was evidence of sexual bias in Clark's Sociology Department, and based upon this finding, declared that petitioner was entitled to relief under Title VII. Accordingly, the University was directed to reinstate petitioner for a two-year probationary period, and to reconsider her for tenure at the end of such period. Pet. A. 106.

On appeal, the Court of Appeals for the First Circuit vacated the District Court judgment and remanded the case for a new trial. *See Fields* v. *Clark University*, 817 F.2d 931 (1st Cir. 1987). The First Circuit ruled that the trial court had incorrectly applied the burdens of proof in adjudicating plaintiff's Title VII claim. In articulating the applicable standard, the First Circuit held that even if a plaintiff offers direct evidence that discrimination was a motivating factor in an employment decision, the plaintiff is not entitled to any relief

under Title VII if the employer can "prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." Pet. A. 88. Accordingly, the First Circuit held:

> "The [district] court also erred by reinstating Fields for two years and awarding back pay without finding that the university, after having been afforded the opportunity to prove Fields would not have been granted tenure absent discrimination, failed to carry its burden of proof. We, therefore, remand the case for a new trial on all issues by another district court judge."

Pet. A. 90-91.

On remand, the case was assigned to the Honorable Robert E. Keeton. After holding a four-day trial, the Court on April 16, 1991 issued its Findings of Fact and Conclusions of Law. Upon an analysis of the evidence and applicable legal principles, the Court concluded that petitioner had failed to establish that she was qualified for tenure at Clark and hence had failed to establish a *prima facie* case of sex discrimination under the principles announced by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). More specifically, the Court stated:

> "Having weighed the evidence presented by plaintiff in this case, I find that she has not shown by a preponderance of the evidence that she was sufficiently qualified to place her in the middle group of tenure candidates in the sociology department at Clark University. . . . [p]laintiff was denied tenure by unanimous vote at each stage in the tenure review process, and failed to receive support from other men and women on the Clark faculty. Plaintiff's own testimony established that she had difficulties teaching some of the large courses to which she was assigned, and much of plaintiff's testimony was in the form of argument as opposed to recita-

> tion of fact. Defendant has introduced student evaluations and testimony from plaintiff and the defense witnesses showing that her teaching was criticized by several of her students and that the chair of her department told her on numerous occasions that he was receiving complaints from her students."

Pet. A. 47-48.

The Court further held that, regardless of whether or not petitioner had established a *prima facie* case, the University was entitled to prevail because it had articulated a legitimate, nondiscriminatory reason for its tenure decision — petitioner's poor teaching ability — and petitioner had failed to prove that this reason was a pretext for sex discrimination. Pet. A. 49.

In addition, the Court held that this case did not warrant analysis as a "mixed motive" case, because the evidence was insufficient to support a finding that petitioner's gender was a motivating factor in the University's decision. In reaching this result, the Court held that petitioner's testimony that one of her colleagues engaged in sexually biased conduct more than 18 months *prior* to the tenure decision did not compel the application of the *Price Waterhouse*[1] analysis in light of the *de minimis* role of petitioner's colleague in the ultimate tenure decision:

> "Even if I were to credit this statement as direct evidence of an improper motivation on the part of Gerber in a tenure vote made two years later, I could not find that improper motives on the part of one member of a six member department would constitute direct evidence of an improper motive on the part of the sociology department as a whole in its unanimous vote to deny tenure. Moreover, the recommendation of the sociology department was only the first stage of a tenure review process

[1] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

that included unanimous concurrence by the COP, the President, the Board of Trustees and the FRC."

Pet. A. 42-43.

Finally, the Court held that even if petitioner had established a mixed motive case, the University was still entitled to prevail because it had introduced sufficient evidence to satisfy its burden of persuasion under a mixed motive legal analysis. Pet. A. 44-45. In accordance with this opinion, the Court entered judgment for the defendant on April 16, 1991. Petitioner subsequently moved to alter or amend the Court's findings, rulings and order, or, in the alternative, for a new trial. The Court denied plaintiff's motion in a Memorandum and Order dated May 20, 1991.

On appeal, the First Circuit affirmed, stating that petitioner had failed to show that she was qualified for tenure at Clark, and hence had failed to establish a *prima facie* case that her sex had played *any* role in the University's denial of tenure to her. The First Circuit further stated that a "thorough review of the record provides no opportunity for this Court to find that the District Court's decision [with respect to petitioner's lack of tenure qualifications] was clearly erroneous." Pet. A. 21.

REASONS FOR DENYING THE WRIT

The decision of the First Circuit affirming the judgment of the District Court is consistent with the decisions of this Court and of other courts of appeal. The petition does not present any issue warranting review by this Court, particularly in light of the idiosyncratic and fact-intensive nature of tenure decisions and the unimpeachable findings of fact made by the District Court.

1. The first question suggested by the petition — whether a Title VII plaintiff who sufficiently proves that gender was a motivating factor in an adverse university tenure decision

within the meaning of *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) must also prove a *prima facie* case of discrimination as set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) — is not presented in this case. The District Court specifically found that petitioner had *not* sufficiently proven that her gender was a motivating factor in the University's denial of tenure to her, and the First Circuit affirmed this finding as not clearly erroneous.

Contrary to petitioner's assertions, she did not present any direct evidence of discrimination in this case. Rather, the most petitioner did was to introduce evidence that, nearly two years prior to the decision in her tenure case, one of her colleagues in the Sociology Department, Stan Gerber, said to her "that's not the way to behave if you want tenure around here" the day after she had rebuffed a pass he made at her. As the District Court specifically found, even if this constituted direct evidence that Gerber subsequently voted to recommend against tenure for petitioner because of her sex, it had nothing whatsoever to do with any of the other members of the Sociology Department who likewise voted to recommend against tenure for petitioner, nor with the numerous other faculty members and administrators who concurred in that recommendation. Pet. A. 42-43. In fact, petitioner's qualifications for tenure were independently evaluated by more than 20 faculty members and administrators at Clark, and the recommendation against tenure was unanimous at each level of the review process. Thus, petitioner did not present any direct evidence that she was denied tenure because of her sex.

In the absence of any such direct evidence, the First Circuit properly reviewed whether petitioner had presented any inferential evidence of gender discrimination and, in connection with that review, properly relied on the *prima facie* case analysis suggested by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). This was plainly consistent with this Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* did not hold

that a Title VII plaintiff is relieved of any burden to produce probative evidence of unlawful consideration of gender, only that once she has done so, the burden shifts to the employer to show that it would have reached the same decision regardless of such consideration. Since, in the present case, petitioner did not present any such evidence—direct or inferential—that was credited by the District Court, her claim of sex discrimination was properly dismissed. The First Circuit correctly so held.

2. There was no error in the District Court's holding that petitioner had failed to present sufficient evidence—direct or otherwise—of gender consideration to shift the burden to Clark to show that it would have denied tenure to petitioner even without such consideration. As the District Court noted, petitioner's purported proof of gender consideration pertained to only one of the six members of the Sociology Department who considered her case,[2] and had nothing whatsoever to do with any of the other Clark committees and administrators who subsequently considered her case. Under these circumstances, petitioner's evidence was clearly insufficient to prove that her gender had anything to do with the University's ultimate decision to deny tenure to her. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor J., concurring) ("stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers or statements by decisionmakers unrelated to

[2] Petitioner asserts at page 37 of her petition that a second member of the Sociology Department, Dr. Edward Sampson, condoned Dr. Gerber's "not the way to behave if you want tenure" comment when he subsequently stated to petitioner, in response to her complaint about the comment, "which of us would you prefer?" This testimony of petitioner, made for the first time at the second trial some 15 years after the alleged event, bears all the marks of a recent contrivance. Moreover, even if made, Dr. Sampson's alleged comment, as the District Court noted, fell far short of constituting direct evidence of gender discrimination by the several University entities that decided petitioner's case.

the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."); *Jackson* v. *Harvard University*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 111 S. Ct. 137 (1990) (declining to apply *Price Waterhouse* "mixed motive" analysis where an allegedly biased member of a tenure review subcommittee played a *de minimis* role in the ultimate decision to deny tenure.).

Indeed, the weighing of the evidence at trial to determine whether gender bias skewed the decision-making process is precisely the type of question of fact that is properly left to the discretion of the District Court. *See Jackson*, 900 F.2d at 467. The District Court, after an extensive examination of the documentary and testimonial evidence at trial, resolved that issue against the petitioner. There is no basis for holding that this finding was clearly erroneous.[3]

Furthermore, the District Court ruled that even if it were to assume the sufficiency of petitioner's evidence of gender discrimination, Clark had satisfied its burden under *Price Waterhouse* of proving that petitioner would not have been granted tenure in any event. Thus, the District Court stated:

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[3] Petitioner's reliance upon *Barbano* v. *Madison County*, 922 F.2d 139 (2d Cir. 1990) is of no assistance. The Court in *Barbano* merely held that on the record before it, the district court's finding of gender discrimination in the decision-making process was not clearly erroneous. Significantly, however, the Court in *Barbano* recognized that "discrimination by one individual does not necessarily imply that a collective decision-making body of which the individual is a member also discriminated." 922 F.2d at 142. Moreover, in contrast to this case — where the allegedly biased conduct occurred 18 months *before* petitioner's tenure review — the plaintiff in *Barbano* established that overt discriminatory conduct occurred during the actual job interview *and* that there was knowing and informed toleration of the discriminatory conduct by all members of the interview committee. In addition, one of the participants in the interview was chairman of the board which was responsible for making the final employment decision. In contrast, there is *no* evidence in this case that any sexually biased statements or conduct occurred during the Sociology Department's tenure deliberations in the Fall of 1974, and, moreover, no member of the Department participated in or influenced any of the subsequent tenure deliberations by other University committees.

> "Also, plaintiff's claim fails for the additional reason that defendant's evidence is strong enough to prevail even if plaintiff had succeeded in the first step under either analysis. That is, even if I were to determine that plaintiff had introduced sufficient evidence to show a prima facie case under *McDonnell Douglas*, or under *Hopkins* to make this a mixed motive case, rather than a pretext case, I would not ultimately decide for the plaintiff because defendant has introduced sufficient evidence of a legitimate, non-discriminatory reason for its decision to deny plaintiff tenure to satisfy its burden of persuasion even under the *Hopkins* analysis."

Pet. A. 44-45.

Petitioner has not, and cannot, suggest any basis for setting aside this additional finding as clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure. To the contrary, as summarized by both the District Court and the First Circuit, the evidence—in the form of written reports from disinterested students—was overwhelming that petitioner's performance as a teacher was inadequate for an award of tenure at Clark. Accordingly, even assuming that the *Price Waterhouse* analysis was applicable in this case, there would still be no basis for setting aside the District Court's dismissal of petitioner's claim.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 11, 1992